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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JULIA SAAVEDRA BALMACEDA, INC., ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Was the majority of the in banc Court of Appeals for the Third Circuit (by a 7-6 vote) correct in affirming the dismissal of complaints filed by Chilean businesses under the Federal Tort Claims Act for harm caused by the non-discretionary conduct of government laboratory technicians in negligently testing and falsely reporting the presence of cyanide in Chilean fruit, when, contrary to the allegations of the complaints and in the absence of a record, the Third Circuit majority based its affirmance on a characterization of the complaints as seeking damages caused by discretionary governmental actions occurring subsequent to the negligent laboratory testing?

LIST OF PARTIES AND RULE 29.1 LIST

The complete list of all Petitioners is contained in the Petitioners' Appendix ("Pet. App.") at 59a-111a. There are no parent or subsidiary companies of any of the Petitioners.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
I. Introduction	3
II. The Chilean Grape Crisis: Its Several Stages	4
III. The Plaintiffs' Claim of Negligence	7
IV. The Proceedings Below	8
REASONS FOR GRANTING THE PETITION	10
I. Intra-Circuit and Inter-Circuit Splits	12
A. The Third Circuit—*Fisher Brothers*	12
B. The Fourth Circuit—*Patterson*	14
C. The Eighth Circuit—*Appley Brothers*	15
II. Importance of the Issue	17
A. Importance to the Current Litigants	17
B. Importance to the Integrity of the U.S. Legal Process	17
C. Importance to the Interpretation of the Tort Claims Act	18
III. Incorrectness of the In Banc Majority Decision	19
CONCLUSION	25

TABLE OF AUTHORITIES

Cases: Page

Alabama Elec. Corp., Inc. v. United States, 769 F.2d 1523 (11th Cir. 1985) 23

Andrulonis v. United States, 952 F.2d 652 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2992 (1992)..... 23

Appley Bros. v. United States, 7 F.3d 720 (8th Cir. 1993) . 11, 15, 16, 17, 19

Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992).... 23

Berkovitz v. United States, 486 U.S. 531 (1988) 9, 12, 16, 18, 19, 20, 24

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)..... 22

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 22

Ford v. Jeffries, 379 A.2d 111 (Pa. 1977)..... 21

Harvey v. Hansen, 445 A.2d 1228 (Pa. Super. Ct. 1982).. 21

Indian Towing Co. v. United States, 350 U.S. 61 (1995) .. 11, 12, 24

Kennewick Irrigation Dist. v. United States, 880 F.2d 1018 (9th Cir. 1989) 23

Patterson v. United States, 856 F.2d 670 (4th Cir. 1988). 14, 15

Patterson v. United States, 881 F.2d 127 (4th Cir. 1989) .. 11, 15, 17, 19

United States v. Gaubert, 499 U.S. 315 (1991) .. 12, 18, 19, 20

United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984) 19

Statutes and Rules:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1346(b)..... 2, 3, 13, 21

28 U.S.C. § 2680(a)..... 2, 3, 13, 18, 23

TABLE OF AUTHORITIES—*(Continued)*

Statutes and Rules:

	Page
Fed. R. Civ. P. 8	20
Fed. R. Civ. P. 11	20
Fed. R. Civ. P. 12	21, 22, 24
Fed. R. Civ. P. 50	21
Fed. R. Civ. P. 56	21

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Julia Saavedra Balmaceda, *et al.,* respectfully petition for a writ of certiorari to review the decision of the in banc United States Court of Appeals for the Third Circuit affirming the dismissal of six cases which had been consolidated on appeal.

OPINIONS BELOW

The Memorandum and Order of the district court, dated December 30, 1992, dismissing the Petitioners' complaints in five cases is reported at 815 F. Supp. 823 (E.D. Pa. 1992) and is reprinted here at Pet. App. 50a-57a. The final judgment Order dismissing the sixth case, entered the same day, is reprinted at Pet. App. 58a. The panel decision of the Third Circuit, dated February 25, 1994, reversing the district court, is not officially reported, but is reprinted here at Pet. App. 28a-49a. The 7 to 6 in banc decision of the Third Circuit, dated

January 25, 1995, affirming the district court Order, is reported at 46 F.3d 279 (3d Cir. 1995) and is reprinted here at Pet. App. 1a-24a.[1]

JURISDICTION

The Court of Appeals for the Third Circuit entered its judgment, after in banc consideration, on January 25, 1995 (Pet. App. 25a-27a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provisions are 28 U.S.C. §§ 1346(b) and 2680(a). Section 1346(b) provides in full:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2680(a) provides that Section 1346(b) shall not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

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1. The Petitioners before this Court include the plaintiffs in five of the six cases covered by the Third Circuit's in banc decision. The plaintiff in one of the cases, Fisher Brothers Sales, Inc., is not a petitioner here.

agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

I. Introduction

In six actions brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (the "Tort Claims Act" or the "Act"), approximately 2,400 growers, shippers, exporters and importers of Chilean fruit seek in excess of $210 million from the United States for damages resulting from, what has come to be known as, the "Chilean Grape Crisis." In their complaints, the Plaintiffs allege that the Food and Drug Administration (the "FDA") ordered an embargo of Chilean fruit by the United States in March 1989 on the basis of an incorrect finding of cyanide in two Chilean grapes by the FDA's Philadelphia laboratory. The complaints allege that FDA employees negligently conducted and reported the results of non-discretionary laboratory tests which purported to show the presence of cyanide in two grape berries, and further allege that Plaintiffs were harmed as a direct and proximate cause of this negligent, non-discretionary laboratory testing. The district court dismissed the complaints for lack of subject matter jurisdiction, citing the Act's discretionary function exception set forth at 28 U.S.C. § 2680(a). The cases were consolidated for appeal, and a panel of the Third Circuit reversed the district court's dismissal of the complaints. The consolidated appeals were then heard by the Third Circuit in banc, and the full Third Circuit affirmed the district court by a 7-6 margin.

At issue in this Petition is whether the complaints were properly dismissed at the pleading stage based upon application of the discretionary function exception. The complaints alleged that negligent conduct on the part of FDA laboratory technicians led to an incorrect finding and reporting of cyanide in Chilean grapes and that this negligence was the cause-in-fact and proximate cause of the damages resulting from the ensuing embargo of Chilean fruit. Although the laboratory testing challenged as

negligent was concededly not discretionary, the district court and Third Circuit in banc majority concluded that the discretionary function exception to the Tort Claims Act nonetheless barred claims for damages. Subsequent to the laboratory negligence, the FDA Commissioner ordered an embargo and the destruction of Chilean fruit. The district court and the Third Circuit in banc majority characterized this order as discretionary—although there is no support in the record for this characterization, since the record consists of only the complaints and the United States' motion to dismiss—and on the basis of this characterization, dismissed the complaints as alleging damages caused by discretionary conduct. The Plaintiffs, now Petitioners before this Court, challenge this result.

II. The Chilean Grape Crisis: Its Several Stages[2]

The Chilean Grape Crisis actually began on Thursday, March 2, 1989, when an anonymous caller to the United States Embassy in Santiago, Chile stated that Chilean fruit exported to the United States would be injected with cyanide. The FDA took the lead agency role in evaluating the seriousness of the statement. By Monday, March 6, 1989, because of the lack of any evidence that fruit had been tampered with, and based on the preliminary clinical tests by the FDA, among others, that cast doubt on the credibility of the caller's claim, the FDA publicly announced that it considered the March 2 call a hoax.

The following day, March 7, 1989, the U.S. Embassy in Santiago received a second anonymous call stating that unidentified Chilean fruit had already been injected with cyanide and that the caller had access to orchards, storage facilities and shipping locations in Chile. On Saturday, March 11, 1989, the FDA's Philadelphia District Office doubled the inspection level on incoming Chilean fruit, beginning with the fruit arriving in Philadelphia on the vessel *Almeria Star.* Government inspectors desig-

2. The following facts are alleged in the complaints and must be accepted as true for purposes of the United States' motion to dismiss. *See* Pet. App. 5a-7a.

nated fruit arriving in locked and sealed holds to be examined and sent any "suspect" fruit to the FDA's Philadelphia District Office laboratory by FDA courier. Upon delivery to the FDA's Philadelphia laboratory, "suspect" fruit was tested in assembly-line fashion.

On Sunday morning, March 12, 1989, an FDA inspector reported finding two grapes from those unloaded from the *Almeria Star* which contained "puncture" holes and uniform white rings. Upon further examination of the crate containing the grapes, a third white-ringed grape, with a "slit" rather than a puncture, was reportedly located. These three grapes were sent by FDA courier to the FDA's Philadelphia laboratory. The crate in which they were found was also sent to the laboratory.

Sometime after 2:00 p.m. on March 12, 1989, FDA laboratory technicians in Philadelphia began testing the two punctured grapes for the presence of cyanide. Rather than reserve any portion of the two grapes for later confirmatory testing, as required by FDA regulation and good laboratory practice, the FDA technicians improperly designated the third, slit grape as the confirmatory "reserve." They macerated the two grapes into a solution (the "two grape-solution") and subjected the solution to the cyantesmo strip test, a qualitative test which is used to determine the presence of cyanide. Two strips were exposed to the solution and each reportedly showed the presence of cyanide in the solution. The solution was next neutralized/pH adjusted by the addition of sodium hydroxide.

Later in the evening, Philadelphia laboratory technicians subjected the remainder of the two-grape solution to a quantitative test designed to measure the amount of cyanide present in a specimen. This is known as the chloramine-T analysis. According to the FDA Philadelphia laboratory official report, this test showed a presence of cyanide at an unexpectedly high concentration level for grapes presumed to have been contaminated in Chile at least two weeks prior to the testing.

At about 5:30 p.m., while the Philadelphia laboratory was still conducting tests, an FDA technician took a portion of the two grape solution, along with the slit grape and the bunch from which these grapes were removed, by airplane, to the FDA's Cincinnati laboratory, which had special expertise in examining fruit for cyanide contamination. Upon initial examination, the Cincinnati laboratory personnel also identified two additional white-ringed grapes on the grape bunch sent to it. However, according to tests performed (and recorded contemporaneously) at the Cincinnati laboratory that evening, the remaining portion of the two grape solution, the slit grape and the two additional white-ringed grapes sent to Cincinnati showed no presence of cyanide.

At approximately 9:30 p.m. on March 12, 1989, the Philadelphia laboratory orally reported positive test results from the two-grape solution to the FDA's emergency operations center. Several hours later, shortly after midnight on March 13, 1989, the FDA's Cincinnati laboratory could not confirm or validate the Philadelphia laboratory results. To the contrary, the Cincinnati laboratory reported that no cyanide was detected in its portion of the two-grape solution, or in the slit grape and the two additional white-ringed grapes. Thereafter, tests continued in both laboratories, but these tests were negative for cyanide.

Notwithstanding the absence of any confirmation through ongoing testing, the oral report of a positive cyanide finding from the Philadelphia laboratory on March 12, 1989 was never withdrawn. On the basis of that report, the FDA took three actions on March 13: (1) It refused entry of any further Chilean fruit into the United States; (2) it forced the withdrawal and destruction of all Chilean fruit then in the distribution process; and (3) it issued a press release. The press release was widely and internationally issued at 5:00 p.m. E.S.T. by then-FDA Commissioner Young. It publicized, *inter alia,* the Philadelphia laboratory's finding of cyanide in two Chilean grapes and also publicized the FDA's order to refuse to

allow Chilean fruit to be admitted into the United States. Consumers were urged to dispose of all Chilean fruit they might have, and persons in the grocery business were instructed to withdraw all such fruit from their shelves. Thus, the FDA's negligently conducted Philadelphia laboratory tests, as reported, effectively resulted in the destruction of the United States market for Chilean fruit at the height of the import season and severely depressed the international market for Chilean fruit as well.[3]

III. The Plaintiffs' Claim of Negligence

The complaints filed against the United States allege that the FDA technicians in the Philadelphia laboratory were negligent in their handling of the two grape berries which were found to contain cyanide. The technicians failed properly to divide their testing sample, thus leaving them unable to confirm their positive findings. They failed to record their observations contemporaneously with their testing, thereby rendering uncertain the accuracy of the oral report and the subsequently recorded results. Additionally, the technicians failed to take account of the known properties of cyanide in fruit, which knowledge was available to (and largely generated by) the FDA. Specifically, the findings reported by the FDA's Philadelphia laboratory were inconsistent with scientific knowledge about the appearance of cyanide tainted fruit, the retention of cyanide in fruit and the effects of contamination on that fruit's surroundings. As the complaints allege, the slipshod procedures of the Philadelphia laboratory failed to con-

3. The allegations of the Petitioners' complaints were confirmed, and the embargo was exposed as having had no justification in fact, when, in December 1994, well after all of the complaints had been dismissed, the United States declassified the transcript of a June 9, 1989 telephone call to the United States Embassy in Chile from an individual who was recognized to have placed the calls to the Embassy on March 2 and 9 of 1989. (A transcription of that conversation, as translated by the United States and produced in response to a Freedom of Information Act request, appears at Pet. App. 112a to 117a.) During the June phone call, the caller admitted that he had lied about poisoning fruit from Chile with cyanide. "There was nothing, only a lie . . . the biggest lie," the caller stated. Pet. App. at 112a.

form to accepted scientific standards of good laboratory practice and to the standards set forth in the FDA's own regulatory procedures manual. *See* Pet. App. 7a.

All evidence available demonstrates that, in reality, the FDA Philadelphia laboratory personnel had negligently contaminated the Chilean grape samples with cyanide already in the laboratory and that this negligent laboratory conduct led to the erroneous conclusion that cyanide was present in the two grapes prior to maceration. Absent the finding, recording and reporting of cyanide in the two grape berries, the FDA Commissioner would not have taken the steps actually taken on March 13, 1989. In fact, until the time these findings were reported to the FDA Commissioner, the FDA had considered the initial phone call threatening cyanide contamination of Chilean fruit to have been a hoax. The importation of Chilean fruit was also not adversely affected by the second threatening phone call. Instead, the subsequent negligence in laboratory testing, recording and reporting, which are the critical claims of negligence made by the Plaintiffs, directly caused those losses for which redress is proper under the Tort Claims Act.

IV. The Proceedings Below

Six complaints were filed in the district court against the United States under the Tort Claims Act for claims arising out of the Chilean Grape Crisis. (The "main case" was brought on behalf of approximately 2,400 Chilean exporters and growers; the other five cases were filed on behalf of single entities.) The United States District Court for the Eastern District of Pennsylvania granted the United States' motion to dismiss all cases on December 30, 1992. Pet. App. at 50a-57a and 58a. The district court concluded that the discretionary function exception to the Tort Claims Act barred the Plaintiffs' claims for money damages. Notwithstanding the allegations of the complaints, the district court focussed its attention upon the conduct of the senior FDA officials, rather than on the laboratory technicians:

> [The FDA] had the discretion to refuse entry into the United States. The actions taken were not violative of any

> regulatory or statutory provisions. The acts taken were in accordance with the FDA's authority to determine whether or not a specific product should be allowed entrance into the United States. This conduct is grounded in the policy of protecting the public health. The actions were clearly in furtherance of the FDA's statutory mission to protect the American public from adulterated food. All the acts involved judgment and choice and were grounded in policy.

Pet. App. at 56a.[4]

After consolidation of the cases for appeal, a majority of a three-judge panel of the United States Court of Appeals for the Third Circuit reversed. Pet. App. at 28a-49a. The panel majority held that "the FDA Commissioner's decisions to test fruit from Chile or, based upon properly performed testing, to take action to remove all Chilean fruit from the marketplace ... are not relevant to our inquiry here." Pet. App. at 39a (footnote omitted). Applying this Court's two-part test for discretionary conduct—announced in *Berkovitz v. United States,* 486 U.S. 531 (1988)—to the conduct of the FDA laboratory technicians, the panel majority concluded that "the FDA's lab technicians had no appreciable discretion as to the manner in which they tested the suspect grapes. And any discretion that they did have was not the kind shielded from liability by the discretionary function exception." Pet. App. at 42a.

The appeal of the district court Order was subsequently considered in banc by the Third Circuit, and the district court's dismissal of the complaints was ultimately affirmed by a 7-6 margin. Focussing on the FDA Commissioner's March 13, 1989 order, and not on the Philadelphia laboratory tests of the prior day which the complaints allege, and the United States' motion to dismiss admits, were negligently performed, the in banc majority concluded that the discretionary function exception must apply "whenever the immediate cause of the plain-

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4. The district court, in its Memorandum, addressed only the Commissioner's decision to refuse entry of Chilean fruit into the United States; the court, however, failed to address the propriety of the decision to order the destruction of fruit already in the United States.

tiff's injury is a decision which is susceptible of policy analysis and which is made by an official legally authorized to make it." Pet. App. at 4a. Although claiming to recognize that on a motion to dismiss the Plaintiffs' factual allegations must be accepted, the in banc majority nevertheless held that it was free to formulate its own "characterization" of the complaints' allegations: "The reality here is that the injuries of which the plaintiffs complain were caused by the Commissioner's decisions and, as a matter of law, their claims are therefore 'based upon' those decisions." Pet. App. at 13a.

Not surprisingly, the in banc dissenters criticized the majority for failing to accept the allegations in the complaints regarding causation as true.

> [We] do not question the majority's conclusion that the Commissioner's action in ordering the testing was discretionary. [We] believe, however, that the majority's view of the case misapprehends the precise nature of plaintiffs' claims under the FTCA. Plaintiffs do not argue that the initial decision to test was not a protected discretionary function. What plaintiffs do argue is that the decision to withdraw Chilean fruit from the market was proximately caused by the positive test results. Plaintiffs contend that the tests performed by the FDA's Philadelphia laboratory were negligently performed in that the procedures used conformed neither to the FDA's Regulatory Procedures Manual nor to good laboratory practices. . . . Thus, plaintiffs do not challenge the FDA Commissioner's decisions to test fruit from Chile or, based upon properly performed testing, to take action to remove all Chilean fruit from the marketplace.

Pet. App. at 18a-19a.

REASONS FOR GRANTING THE PETITION

This Court should review the decision of the in banc Third Circuit in these cases for at least three important reasons.

First, the courts of appeals are sharply divided on the issue of the proper application of the discretionary function

exception to the Tort Claims Act. The active judges of the Third Circuit Court of Appeals divided 7 to 6 in these cases, and two other Courts of Appeals, the Fourth and Eighth Circuits, have confronted the precise issue presented by this Petition and have reached different conclusions. *See Appley Bros. v. United States,* 7 F.3d 720 (8th Cir. 1993); *Patterson v. United States,* 881 F.2d 127 (4th Cir. 1989) (in banc). The Fourth Circuit, in banc, concluded that the discretionary function exception applied, and its decision was cited by the Third Circuit's in banc majority. Pet. App. at 16a. The Eighth Circuit (by a 2-1 panel vote) refused to apply the exception in similar circumstances, and its decision was cited by the dissenters in the Third Circuit's in banc decision. Pet. App. at 22a, n.1.

Second, this Court should grant the Petition because of the importance of the issue raised. The Petition itself concerns over 2,400 claimants who have suffered damages in excess of $210 million resulting from events that have become of international concern. The ruling of the in banc Third Circuit has effectively closed the door on a merits-based review of the claims of the agricultural sector of the nation of Chile, thereby undermining international confidence in the fairness of the judicial process of the United States. Besides application to these cases, the Petition also raises an issue of fundamental importance to future litigation under the Federal Tort Claims Act, a significant federal statute which provides the primary basis for liability on the part of the United States for the negligence of its employees.

Finally, the Court should grant this Petition and reverse the district court's dismissal of the complaints in these cases because the in banc Third Circuit's affirmance of that dismissal is contrary to both the text of the Tort Claims Act and to precedent of this Court as well as numerous courts of appeals applying the discretionary function exception. The in banc majority failed to accept the allegations of causation contained in the complaints and further failed to apply Pennsylvania's law of negligence for determining legal and proximate causation. The decision creates an immunity for non-discretionary conduct not contemplated by the Act and is directly contrary to the principle, established by this Court in *Indian Towing*

Co. v. United States, 350 U.S. 61 (1995), that employees of the United States must perform non-discretionary tasks in a non-negligent manner in order to avoid liability under the Act.

I. Intra-Circuit and Inter-Circuit Splits

A. The Third Circuit—*Fisher Brothers*

Perhaps the most compelling reason for granting certiorari in this case is to address the issue that caused a 7 to 6 split in the in banc Third Circuit and on which the courts of appeals are in conflict. Applying the same statutory language and the same precedents from this Court, the full Third Circuit was divided almost evenly as to what conduct the discretionary function exception should be applied in these cases.

The essential dispute between the majority and dissenting opinions of the in banc Third Circuit is over the governmental conduct to which the discretionary function exception applies in these cases. Is it, as the majority held, the conduct of the FDA Commissioner, as to which no record exists, in ordering the embargo of Chilean fruit? Or is it, as the dissenters argued (and the Plaintiffs' complaints pleaded), the conduct of the FDA laboratory technicians in testing for the presence of cyanide in Chilean fruit? While this Court has clearly set out the test that applies to determine if conduct is or is not discretionary, *see, e.g., United States v. Gaubert*, 499 U.S. 315, 322-23 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988), no clear standard applies to determine what conduct should be scrutinized under the test, especially where numerous governmental acts precede the alleged harm.

The Plaintiffs in these cases alleged plainly that the losses they suffered were caused, legally and proximately, by negligent conduct of the FDA's Philadelphia laboratory technicians, conduct which even the United States admits was not discretionary. The in banc majority, nevertheless, held that the "plaintiffs in these cases were injured by several policy decisions made by the Commissioner of the [FDA]." Pet. App. at 4a; *see also* Pet. App. at 13a ("The reality here is that the injuries of which the plaintiffs complain were caused by the Commissioner's decisions"). Thus, the in banc majority chose to

recast the complaints because, they believed, the Plaintiffs' claims were "inconsistent with the purpose of the discretionary function exception." Pet. App. at 12a.

In effect, the Third Circuit in banc majority held, in the absence of a record and in the guise of construing the Plaintiffs' complaints, that the FDA Commissioner's conduct was (1) an intervening cause of the Plaintiffs' harm, (2) discretionary in nature, and (3) immune from liability under the discretionary function exception. The dissenters, on the other hand, stated that at the motion to dismiss stage, the Plaintiffs' factual allegations regarding causation must be accepted as true. Pet. App. at 19a. Accordingly, the dissenters would have reversed the dismissal of the cases because the conduct alleged to have been performed negligently (laboratory testing) was not protected by the discretionary function exception. *Id.*

The struggle between the majority and dissenting opinions of the full Third Circuit centers upon the interplay between the two provisions of the Tort Claims Act. In general, the Act provides that the United States shall be liable for acts of its employees and agents if a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). However, the Act exempts any claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function." 28 U.S.C. § 2680(a). The Plaintiffs have pleaded, properly under Pennsylvania law (the state in which the testing occurred), that non-discretionary laboratory negligence caused their losses. The United States has asserted instead, and the in banc majority has found, in the absence of a record, that discretionary conduct caused the harm. In the context of the Tort Claims Act, this Court now needs to establish a standard for reviewing the sufficiency of a complaint's allegations as to the governmental conduct, preceding a loss, that may properly be pleaded as the legal and proximate cause of the harm. The Plaintiffs and the in banc dissent contend that a complaint is sufficient under the Act if it pleads a claim sufficient under state law negligence principles. The in banc majority, however, appears to have fashioned a federal common law standard of review that would permit construction

of a complaint to effectuate the "purposes" of the Act even if state law negligence principles are supplanted.

B. The Fourth Circuit—*Patterson*

As noted above, the Third Circuit is not the first federal circuit court to split internally in deciding what conduct is to be considered the cause of harm in a Tort Claims Act case, where some, but not all, of the conduct preceding the harm may be protected by the discretionary function exception. The Fourth Circuit grappled recently with this issue in a case that followed a path remarkably similar to the cases at hand.

In *Patterson v. United States,* 856 F.2d 670 (4th Cir. 1988), the appellant was the administratrix of the estate of an individual killed by inhalation of gases emanating from a year old subterranean fire. The subterranean fire was set when the home of the deceased's neighbor caught fire and burned into the basement. About six months after the fire, an employee from the federal Office of Surface Mining ("OSM") inspected the site and made a report to his superiors. Based on the report, supervisors at OSM decided that no emergency existed and that no funds would be allocated to abate the subterranean fire. Nevertheless, about six months after the inspection of the site, the deceased inhaled smoke and noxious gases from the subterranean fire, which allegedly caused his death. 856 F.2d at 671.

The administratrix alleged that negligence on the part of the OSM inspector was the legal cause of death. However, the district court dismissed the claim brought under the Tort Claims Act by the administratrix. The issue on appeal was what conduct, that of the inspector (which was not discretionary), or that of the OSM supervisors (which was discretionary), legally caused the harm alleged. The Fourth Circuit panel reversed the dismissal, holding that the negligence pleaded, that of the inspector, was the cause of the alleged harm and was not discretionary conduct. The panel noted, however:

> If the trier of fact finds that it was not Inspector Moore's alleged inadequate work, but OSM's decision not to

> declare the site an emergency that was the proximate cause of death and injury, success by the plaintiffs on the merits will be foreclosed. However, the agency's discretion in spending money or declaring emergencies does not provide blanket protection for all lower-level ministerial acts leading up to the agency's decision.

856 F.2d at 674.

The case was heard in banc by the Fourth Circuit, and over the dissent of one judge the district court's dismissal was affirmed. The Fourth Circuit in banc majority, much like the majority in the in banc Third Circuit decision, found that the intervening discretionary conduct, despite the pleading to the contrary, was the actual cause of the alleged harm:

> [I]t is clear that the OSM, when taking final action in determining that no emergency situation existed which warranted the expenditure of funds for emergency abatement of dangerous conditions, was acting in a discretionary manner.

Patterson v. United States, 881 F.2d 127, 128 (4th Cir. 1989).[5] Thus, the same issue that divided the full Third Circuit recently divided the Fourth Circuit as well.

C. The Eighth Circuit—*Appley Brothers*

In the 1993 decision of *Appley Bros. v. United States,* 7 F.3d 720 (8th Cir. 1993), a panel of the Eighth Circuit split 2-1 on the issue of what governmental conduct, preceding the harm alleged, was the legal and proximate cause of the loss. In *Appley Brothers,* the appellants were a group of farmers and grain elevator operators who had stored grain at the Bird Grain Company warehouse in South Dakota ("Bird Grain"), a federally licensed grain warehouse. Between March 29 and April 1, 1988 inspectors from the United States Department of

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5. The in banc decision of the Fourth Circuit refers to evidence of record, beyond the allegations of the complaint, apparently available to the court. *Id.* Here, in contrast, there is no record other than the allegations of the complaints. Accepted as true, and not contradicted by any record evidence, the complaints in these cases allege harm caused by laboratory negligence.

Agriculture ("USDA") examined Bird Grain and cited it for a number of inventory shortages. The April 1st report noted that Bird Grain had previous shortages and directed that all deficiencies be remedied. On August 5, 1988, the USDA again visited Bird Grain to check compliance with the April 1st directive. However, the August 5th report did not indicate whether prior inventory shortages had been remedied, and Bird Grain remained in operation.

After that date, the appellants continued to deliver grain to Bird Grain for storage. But after a November 15, 1988 USDA inspection where grain shortages were again found, Bird Grain's federal license was suspended on November 22, 1988 and its inventory was liquidated with proceeds distributed on a pro-rata basis. The appellants brought a Tort Claims Act action against the USDA for the difference in the value of the grain delivered from August 5 to November 22, 1988 and their pro-rata distribution. The appellants alleged negligence on the part of the USDA inspectors in connection with their inspection and reporting on August 5, 1988. The district court dismissed the case citing, *inter alia,* the discretionary function exception.

Before the Eighth Court, appellants contended that their losses were caused by the failure of the USDA inspectors to find and report the violation of the April 1st directive during the August 5th inspection. They argued that such conduct was not discretionary under the *Berkovitz* test. 7 F.3d at 722-23. The United States responded that the applicable federal statutory scheme and accompanying regulations allowed the USDA broad discretion in deciding when, and under what circumstances, to suspend a warehouse license. *Id.* at 724. Although it agreed that the ultimate decision to close Bird Grain was discretionary, the panel majority held that the appellants had pleaded non-discretionary conduct as the legal cause of harm in the case:

> The causative fact in Appley Brothers' claims is the inspectors' failure to follow the mandatory requirements of the handbook, not the Secretary's failure to revoke Bird Grain's license.

* * *

> Appley Brothers do not challenge the licensing process. Here, the inspectors failed to obtain the mandated information and, as a result, the Secretary made no decision as to whether to revoke Bird Grain's license, or made a decision based on erroneous information.

7 F.3d at 726 (footnote omitted). The panel majority expressly distinguished the in banc decision in *Patterson*. *Id.* at 726, n.3. The dissent would have affirmed the dismissal of the case on the basis of the discretionary function exception. *Id.* at 728-29. Thus, the same issue has divided the Eighth Circuit as has divided the Third and Fourth Circuits.

II. Importance of the Issue

A. Importance to the Current Litigants

These cases involve more than 2,400 claimants, most of whom are Chilean nationals. The alleged monetary damages in these cases exceed $210 million. Even if this Petition raised issues particular to their cases only, which it does not, the issues on appeal involve a sufficiently large number of parties and involve a significant amount of public funds to warrant review by this Court.

B. Importance to the Integrity of the U.S. Legal Process

These cases also warrant consideration by the Court because of their international significance. Specifically, these cases have raised important issues as to the ability of the United States legal system to address governmental negligence in the context of disputes involving international trade. The 1989 embargo against Chilean fruit essentially crippled the economy of Chile for that year since one of Chile's primary exports is produce, mainly to the United States. The final decision of the in banc Third Circuit denying any merits-based review of these claims was, for obvious reasons, not a satisfactory resolution for the Chilean interests or for other trading parties with the United States. Review by this Court would mean that the Chilean interests would receive consideration of their important claims by this country's highest

Court—consideration they deserve—given the harsh and as yet unremedied effects of the FDA's negligence.

C. Importance to the Interpretation of the Tort Claims Act

These cases raise a significant issue, to date not addressed by this Court, regarding the proper application of the discretionary function exception to the Tort Claims Act. Thus, the Petition involves an issue that will have an impact beyond resolution of these cases. At its core, the issue is what governmental conduct may properly be pleaded as the legal cause of alleged harm, when a series of government actions precede that harm. This issue has been left open by the Court's two most recent decisions interpreting the discretionary function exception. *Gaubert,* 499 U.S. at 315; *Berkovitz,* 486 U.S. at 531.

In *Berkovitz,* the plaintiff contracted polio as an infant from an oral polio vaccine. The plaintiff alleged that the National Institutes of Health had negligently licensed the manufacturer to produce the vaccine and that the FDA had negligently approved the release of the particular lot of the vaccine containing the plaintiff's dose. Damages were sought under the Tort Claims Act. 486 U.S. at 533. In reviewing the Third Circuit's affirmance of the dismissal of the case pursuant to the discretionary function exception, this Court formulated the now applicable two-part test for determining whether conduct should be shielded as the basis of liability pursuant to 28 U.S.C. § 2680(a): the conduct must involve an element of judgment or choice, and it must be of the kind the discretionary function exception was designed to shield. 486 U.S. at 531.

The *Berkovitz* Court, accepting the allegations of the plaintiff's complaint as true at the motion to dismiss stage, then applied this two-part test to all of the acts of negligence alleged to have caused the plaintiff to have contracted polio. The Court concluded that the plaintiff's allegations of governmental negligence in the licensing of a particular manufacturer, in the licensing of a particular vaccine and in the releasing of particular lots of the vaccine should survive a motion to dismiss based upon the discretionary function exception. *Id.* at

540-48. Significantly, however, this Court in *Berkovitz,* unlike the in banc Third Circuit majority in these cases, did not undertake to interpret or characterize the complaint to ascertain the "true" cause of plaintiff's harm for purposes of applying the discretionary function exception.[6]

Similarly, in *Gaubert,* the Court applied the two-part test enunciated in *Berkovitz* to a series of actions taken by the Federal Home Loan Bank Board in advising about and overseeing certain aspects of the operations of a Texas savings and loan institution. Again, the Court did not undertake to characterize the cause of the harm alleged. Instead, accepting the allegations of the complaint as true, this Court found that all of the challenged acts of regulatory negligence were shielded by the discretionary function exception. *Gaubert,* 499 U.S. at 327-334; *see also United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 819-20 (1984) (Court decided that decision on the part of FAA to institute "spot-check" inspection program of aircraft and that the acts of the FAA employees in carrying out the program were both discretionary; Court did not need to address which act was the cause of harm.)

The standard for determining what governmental conduct may properly be pleaded as causing harm is significant in these cases and will be significant in future cases where some conduct preceding the harm is protected by the discretionary function exception and other conduct is not. *See also Appley Bros.,* 7 F.3d at 720; *Patterson,* 881 F.2d at 127.

III. Incorrectness of the In Banc Majority Decision

Besides the split in and among the circuit courts of appeals and the overall importance of the issue raised, this Petition should be granted to correct the result reached by the majority of the in banc Third Circuit in these cases. The

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6. The in banc Third Circuit majority incorrectly distinguished *Berkovitz* as involving "a previously established policy which deprived the decisionmaker of discretion," Pet. App. 15a, whereas the dissent properly concluded that the complaints' allegation of causation "satisfies the pleading requirements of *Berkovitz.*" Pet. App. 20a.

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majority held that claims against the United States are barred in these cases because, despite what the Plaintiffs have pleaded, the cause of the harm was the discretionary conduct of the FDA Commissioner on March 13, 1989. Because there is no record whatsoever as to the conduct of the FDA Commissioner on March 13, 1989, nothing supports the in banc majority's assertion that this conduct was the "real" cause of Plaintiffs' harm. All that is contained in the record is the Plaintiffs' well-pleaded allegations, to which no responsive pleading has been made, that the laboratory negligence caused their losses. Dismissal of the complaints in this context was both procedurally and substantively in error.

1. This Court has twice explicitly stated that, even and specifically, in the context of a motion to dismiss claims brought under the Tort Claims Act on the grounds of the discretionary function exception, the factual allegations of the complaint must be accepted as true. *Gaubert,* 499 U.S. at 327; *Berkovitz,* 486 U.S. at 540. The Third Circuit in banc majority paid lip-service to this standard, but in actuality rejected the factual allegations regarding causation in the Plaintiffs' complaints as "inconsistent with the purpose of the discretionary function exception." Pet. App. at 12a. Petitioners are aware of no procedural or substantive requirement that the facts in a Tort Claims Act complaint need to be pleaded in a manner consistent with the "purpose" of the discretionary function exception. Rather, the facts of a Tort Claims Act complaint need to be consistent with the pleading requirements of Fed. R. Civ. P. 8 and 11, and if so, must be accepted as true at the motion to dismiss stage.

The Plaintiffs pleaded that laboratory negligence was the cause-in-fact and proximate cause of their harm. The United States has not argued that Plaintiffs have violated either Fed. R. Civ. P. 8 or 11 by their complaints. Accordingly, the only conduct that should be considered is the laboratory conduct. Since that conduct under the *Berkovitz* test was not within the discretionary function exception, these cases must be permitted to proceed. The United States, of course, will have every other proce-

dural opportunity (*e.g.*, summary judgment under Fed. R. Civ. P. 56 or judgment as a matter of law under Fed. R. Civ. P. 50) to argue that some other conduct or event was, in actuality, the legal cause of the Plaintiffs' harm. To do that, however, the United States must file a responsive pleading under Fed. R. Civ. P. 12(a) and not a motion to dismiss under Fed. R. Civ. P. 12(b).

2. The procedural infirmity in the majority's decision is compounded by a substantive deviation from the text of the Tort Claims Act. The Tort Claims Act provides a monetary remedy for losses "caused by the negligent or wrongful act or omission of any employee of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The Plaintiffs pleaded negligence on the part of the FDA laboratory technicians under Pennsylvania law, which negligence caused their losses. The United States argues, instead, that an intervening act, the decision of the FDA Commissioner, in fact caused the Plaintiffs' losses. Under Pennsylvania law—the law of the place where the act or omission occurred—the determination of causation and superseding causation are issues of fact to be decided at trial. *See, e.g., Ford v. Jeffries,* 379 A.2d 111, 115 (Pa. 1977); *Harvey v. Hansen,* 445 A.2d 1228, 1234 (Pa. Super. Ct. 1982).

It is significant that during briefing before the in banc Third Circuit, the United States conceded, for purposes of their motion to dismiss, that "the lab technicians' actions satisfy the causational requirements of Pennsylvania tort law." Government's Response to Plaintiffs' Supplemental Filing, July 22, 1994, at 10. The concession made by the United States was critical, but was overlooked by the in banc majority. If the Plaintiffs indeed have pleaded all of the requirements of causation under Pennsylvania's law of negligence, and if the pleaded cause of the harm was not discretionary—which the

United States also concedes—then it is untenable that the Plaintiffs' complaints are barred by the discretionary function exception.

Rather than apply Pennsylvania's law of negligence and allow the issue of causation to be decided by the trier of fact, the majority of the in banc Third Circuit has devised and applied an ill-defined federal common law standard to the statutory requirement that tort claims against the United States are to be decided in accordance with the law of the place where the act or omission occurred. This new federal common law standard appears to be premised on a notion, not supported by the text of the statute or any relevant precedent, that complaints must be pleaded consistent with the "purpose" of the discretionary function exception. The approach adopted by the Third Circuit in banc majority deviates from the plain meaning of the text of the Act, a deviation which violates this Court's admonition that the starting point in statutory construction is the language of the statute itself. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 197 (1976) (citing *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring)). The majority's approach would thus improperly immunize non-discretionary governmental conduct from liability that would attach under applicable state-law principles.[7]

7. To illustrate this point, the following hypothetical is instructive. If the FDA had sent Chilean fruit to a private laboratory in Pennsylvania for testing in March 1989 and that laboratory had negligently concluded that the fruit was contaminated with cyanide, the Plaintiffs would have named the private laboratory as the defendant in a negligence suit. If the Plaintiffs properly pleaded a negligence action under Pennsylvania law (filed in federal court pursuant to diversity jurisdiction) against the private laboratory, the laboratory could not prevail on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) by arguing that the actions of another party, namely the FDA Commissioner, were the legal and proximate cause of Plaintiffs' harm. Such issues of causation are governed by Pennsylvania law, are inherently fact-based, and are inappropriate for disposition on a motion to dismiss in the absence of a record. Since the Tort Claims Act requires the application of Pennsylvania law in these cases, the same fact intensive issues of causation are no more appropriate for determination on a motion to dismiss simply because the FDA engaged its own employees to test the fruit.

3. The majority of the in banc Third Circuit has also departed from a well-established line of circuit court caselaw establishing that the discretionary function exception does not apply to the technical, scientific or mechanical undertakings by federal employees. *See, e.g., Ayala v. United States,* 980 F.2d 1342, 1349-50 (10th Cir. 1992); *Andrulonis v. United States,* 952 F.2d 652, 654-55 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 2992 (1992); *Kennewick Irrigation Dist. v. United States,* 880 F.2d 1018, 1031 (9th Cir. 1989); *Alabama Elec. Corp., Inc. v. United States,* 769 F.2d 1523, 1531 (11th Cir. 1985). Under the majority's analysis, this line of cases will be effectively nullified whenever some non-discretionary governmental conduct occurs after the negligent conduct but before the harm alleged. Thus technical, scientific or mechanical negligence on the part of United States' employees will become cloaked with immunity under 28 U.S.C. § 2680(a) whenever some arguably discretionary act comes between the negligence and any resultant damages.[8]

4. Finally, the result reached by the in banc majority of the Third Circuit in these cases creates a perverse incentive structure for United States employees, which is the exact opposite of the incentive structure Congress intended by the passage of the Tort Claims Act. United States' employees engaged in non-discretionary conduct should be discouraged from performing their tasks in a substandard manner, as are private sector employees, by

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8. Once again, a hypothetical is instructive. Assume a laboratory technician at a Veterans Administration hospital negligently performs a biopsy such that a positive finding of cancer is reported, and that finding is relied upon by surgeons in determining the nature and extent of corrective surgery. If a discretionary decision is made to perform invasive surgery, which was in fact unnecessary, the patient should have an Tort Claims Act claim based upon the laboratory technician's negligence. To permit an intervening discretionary act—the determination to proceed with surgery—to immunize the prior non-discretionary conduct, would essentially overturn the line of cases holding that technical, scientific or mechanical acts are not shielded from liability by the discretionary function exception.

the imposition of liability under the Act for any resulting harm. The Act thus seeks to affect the performance of non-discretionary conduct. Under the construction of the Act implemented by the in banc majority, however, negligent non-discretionary conduct will be shielded from liability if it is followed by discretionary conduct. Contrary to the position of the Third Circuit in banc majority, permitting recovery in cases where non-discretionary conduct forms the basis of later discretionary decisions will not chill conduct at the discretionary level. That conduct, *per se,* would remain immune from challenge. *See* dissenting opinion at Pet. App. 23a.

This is precisely the result that this Court has recognized since the decision in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955). As recently interpreted by this Court in *Berkovitz,* 486 U.S. at 538, n.3, *Indian Towing* stands for the basic proposition that if a discretionary decision to engage in an undertaking is made (there, to maintain lighthouse services), all subsequent conduct is not protected by blanket discretionary function immunity. Rather, subsequent conduct that is not discretionary (there, actually maintaining the lighthouse) is not immunized from Tort Claims Act liability. Likewise in these cases, even if the United States' decisions to test fruit (or later to embargo fruit) are immune from suit as discretionary, the actual non-discretionary testing of fruit is not subject to the same immunity. If the United States undertakes that testing, it must be done in a non-negligent manner. If negligence in that testing is properly pleaded as the cause of harm, the discretionary function exception does not permit dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Dated: April 20, 1995

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1182; 93-1205; 93-1206;
93-1207; 93-1208; 93-1209

FISHER BROS. SALES, INC.

Appellant in 93-1182.

v.

UNITED STATES OF AMERICA

JULIA SAAVEDRA BALMACEDA; AANDRES MUNOZ TORRES; ABALOS LABBE JUAN PABLO; ABATTE OSORIO HONS.; ABDON M. ALVAREZ; ABRAHAM SABAJ NALLAR; ABRIGO OLIVOS RODEMIL; ACEVEDO DURAN OSVALDO HERNAN; ACOSTA RAMIREZ CARLOS; VICTORIANO ACUNA CONTRERAS; MARCO HERIBETO ACUNA MONTERO; JAVIER ACUNA GONZALEZ; MARDONES ADOLFO RIVEROS; ADRIANA RODRIGUEZ LARRAGANA; AGR HENRIQUEZ Y VARELA; AGR KIWI MASTERS LTDA; AGRIC MORANDE LAVIN LTDA; AGRIC CAIQUENES LTDA; AGRIC CARVALLO LTDA; AGRIC CERRILLO LTDA; AGRIC CHOROMBO LTDA; AGRIC COTIELLA LTDA; AGRIC DEL ALTO LTDA; AGRIC DEL VALLE LTDA; AGRIC EL ESPINO N12, et al.

Appellants in 93-1205,

v.

UNITED STATES OF AMERICA

CARBEN, INC.,

Appellant in 93-1206

v.

UNITED STATES OF AMERICA

COMPANIA SUD AMERICANA DE VAPORES S.A.,
Appellant in 93-1207.

v.

UNITED STATES OF AMERICA

NEW MARKET INVESTMENT CORPORATION,
Appellant in 93-1208.

v.

UNITED STATES OF AMERICA

GUZMAN Y DEL REAL, LIMITRADA,
individually and as class representative,

v.

UNITED STATES OF AMERICA

Guzman Y Del Real, Limitrada,
Appellant in 93-1209.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action Nos. 92-02818; 92-00907; 92 01204;
92-01208; 92-01279; 92-04057)

Argued: September 23, 1993

Before: STAPLETON, ROTH and LEWIS,
Circuit Judges

Reargued in banc October 18, 1994
Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON,
MANSMANN, GREENBERG, HUTCHINSON, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS and McKEE,
Circuit Judges

(Opinion Filed January 25, 1995)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, waives the federal government's sovereign immunity with respect to tort claims for money damages. The "discretionary function exception" to the FTCA limits that waiver, stating that the government retains sovereign immunity with respect to "[a]ny claim . . . based upon the exercise or performance [of,] or the failure to exercise or perform[,] a discretionary function or duty . . . , whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The appeals now before the court *in banc* require us to examine the scope of the discretionary function exception.

The plaintiffs in these cases were injured by several policy decisions made by the Commissioner of the Food and Drug Administration ("FDA") while exercising a discretionary function. They seek to avoid the legal consequences that would flow from application of the discretionary function exception to their cases by (1) looking behind the Commissioner's injury-causing decision, (2) finding fault with an aspect of the data upon which it may have been based, and (3) arguing that their claims are not "based upon" the Commissioner's decisions but instead are "based upon" the alleged negligence of various laboratory technicians who supplied the allegedly faulty data to the Commissioner. We reject this attempt to circumvent the discretionary function exception, concluding that if the discretionary function exception to the FTCA is to fulfill its clear and important purpose, a claim must be "based upon" the exercise of a discretionary function whenever the immediate cause of the plaintiff's injury is a decision which is susceptible of policy analysis and which is made by an official legally authorized to make it. Because the plaintiffs' claims are based upon decisions susceptible of policy analysis and made by an official of the executive branch acting within his authority, we will affirm the district court's order dismissing these cases for lack of subject-matter jurisdiction.

For the purpose of our analysis, we have assumed the facts alleged by the plaintiffs to be true. *Berkovitz v. United States*, 486 U.S. 531, 540 (1988). Our "scope of review of the applicability of the discretionary function exception is plenary." *United States Fidelity & Guar. Co. v. United States*, 837 F.2d 116, 119 (3d Cir.), *cert. denied*, 487 U.S. 1235 (1988).

I.

On March 2, 1989, an anonymous caller to the United States Embassy in Santiago, Chile, stated that Chilean fruit bound for the United States would be injected with cyanide. The FDA took the lead agency role in evaluating the seriousness of the call, and it detained all incoming Chilean fruit over the weekend of March 4 and 5 while it undertook an investigation. On March 6, having found no evidence that any Chilean fruit had actually been poisoned, the FDA announced that it considered the call a hoax. It nevertheless continued to conduct experiments concerning the effects that cyanide injections would have on various Chilean fruits.

The embassy in Santiago then received a second anonymous call. This time the warnings were more specific. The caller indicated that he had access to orchards, storage facilities, and shipping locations in Chile, and stated that unidentified fruit had already been injected with cyanide. This prompted the FDA's Philadelphia District Office to double the inspection level of incoming Chilean fruit, beginning with that arriving on the "Almeria Star." The Philadelphia District Office designated that certain portions of the Almeria Star's cargo would be examined, and any fruit that looked "suspect" was to be sent to the Philadelphia District Office for testing.

The increased level of inspection soon yielded results. On the morning of March 12, an FDA inspector discovered two grapes from the Almeria Star which appeared to have been punctured, and which displayed uniform white rings. Further examination of the crate containing these suspect grapes revealed a third white-ringed grape, which, unlike the others, appeared to have been slit rather than

punctured. Although the physical appearance of these grapes was inconsistent with that of grapes injected with cyanide during FDA experimentation, the FDA officials as a precautionary measure sent the grapes, as well as the crate in which they were packaged, to the FDA's Philadelphia laboratory for testing.

The Philadelphia laboratory began testing the grapes for cyanide in the early afternoon of March 12. The FDA technicians used all of the two punctured grapes in conducting their tests, but saved the third, slit, grape for confirmation purposes. The testing process required the grapes to be mashed until they turned into a solution. Sulfuric acid was then added to this slurry, causing a chemical reaction that released in gaseous form any cyanide that was present in the solution. The gas released from the solution was twice exposed to cyanide-sensitive strips of reactive paper, both of which indicated the presence of cyanide. A third test then confirmed a high concentration of cyanide present in the slurry. At approximately 9:30 p.m. on March 12, the Philadelphia laboratory orally reported positive cyanide test results from the solution to the FDA's Emergency Operations Center.

Meanwhile, FDA officials transferred a portion of the slurry, along with the third, slit, grape and the bunch in which these grapes had been found, to the FDA's Cincinnati laboratory. Technicians there identified two additional white-ringed grapes on the bunch, but were unable to confirm the presence of cyanide. The Philadelphia laboratory also continued testing other grapes from the suspect crate, as well as all packing materials in that crate. These further tests also failed to reveal the presence of cyanide.

The Commissioner was supplied with the findings of the Philadelphia and Cincinnati laboratories in the early morning hours of March 13. The information before him at that point was that three tests conducted on two of the suspect grapes indicated the presence of cyanide. The retesting of the slurry and the testing of the third "reserved" grape, the other grapes, and the packaging, however, did not confirm the presence of cyanide. He also knew of the reports to the embassy in Santiago and the surveillance

activity that had already been conducted. On the basis of this information, the Commissioner on March 13 issued an order refusing entry of any additional Chilean fruit into the United States and requiring the withdrawal and destruction of all Chilean fruit then in domestic channels of distribution. The FDA also issued a press release publicizing the Philadelphia laboratory's finding of cyanide in two Chilean grapes and the order refusing the entry of Chilean fruit into the United States. Consumers were encouraged to destroy any Chilean fruit in their possession, and grocers were instructed to remove all Chilean fruit from their shelves.

The plaintiffs in these cases are (1) approximately 2400 Chilean growers and exporters of fresh fruit, (2) a Chilean shipping line, (3) three United States firms that are engaged in the importation and distribution of fresh produce, and (4) a non-certified class whose named plaintiff is a Chilean fruit grower. They seek damages from the United States government under the FTCA, 28 U.S.C. § 1346(b), on a negligence theory, contending that the technicians in the FDA's Philadelphia laboratory were negligent in failing to reserve any portion of the two punctured grapes for later confirmation testing. Plaintiffs claim that this violated both the FDA's Regulatory Procedures Manual and good laboratory practices generally. As a result, the Cincinnati laboratory was unable to verify the positive result reported by the Philadelphia laboratory. Plaintiffs further allege that the lab technicians were negligent in failing to record their observations contemporaneously with their testing, thereby casting doubt on the accuracy of their results and the content of the oral report, and in failing to take account of the known properties of cyanide in fruit. According to the complaint, but for this negligence, the Commissioner would not have issued his orders and the Chilean fruit business for the spring season of 1989 would not have been destroyed.

The United States moved to dismiss, arguing that the district court lacked subject-matter jurisdiction over plaintiffs' claims. The district court granted that motion, reasoning that the discretionary function exception to the FTCA shielded the government's conduct from liability. The plaintiffs appeal.

II.

A.

The Federal Tort Claims Act gives district courts jurisdiction over:

> civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The FTCA thus waives the government's sovereign immunity with respect to tort claims against the United States for money damages.

This waiver of the government's immunity is subject to certain exceptions, however, one of which is the discretionary function exception. 28 U.S.C. § 2680(a). As we have noted, that exception dictates that the waiver "shall not apply to . . . [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The discretionary function exception is designed to protect policymaking by the politically accountable branches of government from interference in the form of "second-guessing" by the judiciary — second guessing the result of which burdens the public fisc and the prospect of which skews the decisionmaking process of executive and legislative policymakers. *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). As the Court explained in *Varig Airlines*:

> [W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role

> as a regulator of the conduct of private individuals. Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception . . . . This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.

Id. at 814 (footnote omitted). Thus, the discretionary function exception is a product of Congress' recognition that "the imposition of liability for damages occasioned by governmental policymaking would necessarily involve a very substantial, if not prohibitive, social cost not only in terms of the imposed liability itself, but also in terms of the constraining effect of that liability on the decisions of governmental policymakers." *Sea-Land Serv., Inc. v. United States*, 919 F.2d 888, 890 (3d Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

Whether the discretionary function exception applies involves a two-pronged inquiry. "[A] court must first consider whether the action is a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. Second, the court must determine whether the element of judgment involved "is of the kind that the discretionary function exception was designed to shield." *Id.* Under this second prong, the court must determine whether the challenged discretionary actions or decisions were "based on considerations of public policy." *Id.* at 537. "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

B.

The district court, applying these principles to the Commissioner's decisions to deny entry of Chilean fruit and

to destroy Chilean fruit already in the United States, found that the decisions were policy decisions protected by the discretionary function exception to the FTCA. We agree. Specifically, the district court concluded:

> The FDA acted to protect the public from the risk of exposure to poisonous fruit which it learned could be coming from Chile. It had the discretion to test the fruit and determine whether the fruit was adulterated. It also had the discretion to refuse entry into the United States. The actions taken were not violative of any regulatory or statutory provisions. The acts taken were in accordance with the FDA's authority to determine whether or not a specific product should be allowed entrance into the United States. This conduct is grounded in the policy of protecting the public health. The actions were clearly in furtherance of the FDA's statutory mission to protect the American public from adulterated food. All the acts involved judgment and choice and were grounded in policy.

Balmaceda v. United States, 815 F. Supp. 823, 827 (E.D. Pa. 1992).

As the district court found, the Commissioner's decisions were clearly "matter[s] of choice" for a person occupying his position. As the plaintiffs readily concede, the orders giving rise to these cases were authorized both in the sense that the Commissioner was acting within the scope of his authority[1] and in the sense that his orders were not in

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1. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-394, provides that the Commissioner of the FDA may "cause to be disseminated information regarding food, drugs, devices, or cosmetics in situations involving, in the opinion of the [Commissioner], imminent danger to the health or gross deception of the consumer." 21 U.S.C. § 375(b); *see also* 21 C.F.R. § 2.5(a). FDA regulations also permit the Commissioner of the FDA to initiate a "recall" of food in distribution channels where the food presents a risk of injury to consumers and recall is needed to protect the public health. 21 C.F.R. § 7.45; *see* 21 C.F.R. §§ 7.40-7.59. Whether and when to initiate a recall in any particular case is a judgment call for appropriate FDA officials to make in light of the perceived "urgen[cy]" of the situation. 21 C.F.R. § 7.40(b). Thus, whether recall is warranted is assessed in light of "the degree of seriousness of the health hazard" and "the likelihood of occurrence of the hazard." 21 C.F.R. § 7.41(a)(4),(5).

conflict with any applicable statute or regulation. In short, the Commissioner was the public official responsible for making these choices and he made them in a lawful manner. Accordingly, we turn to the second prong of a discretionary function exception analysis and consider whether the choices to be made were susceptible to policy analysis.

In making his decisions, the Commissioner was required to evaluate and reconcile in some manner the findings of the Philadelphia and Cincinnati laboratories. Among other things, this would include making a judgment about the significance of the fact that no segment of the first two grapes had been reserved for confirmatory testing. Moreover, the significance of this data had to be judged in the overall context of the reports to the embassy in Santiago, the surveillance activity that had already been conducted, the probability that contaminated grapes, if they existed, would be consumed, and probable consequences of any such consumption to the person poisoned, fruit consumers in general, and to the fruit industry as a whole.

A critical part of the policymaking process was the Commissioner's decision to make a decision in the early morning hours of March 13, rather than to await more surveillance and testing. If he had waited, the plaintiffs might not have suffered the injury of which they complain. Of course, the Commissioner did not wait and, unfortunately, that injury did occur. The point, however, is that the decision about when the data were sufficient to permit responsible decisionmaking involved questions of "social, economic, and political policy." *Varig Airlines*, 467 U.S. at 814. That decision was an inherent part of the policymaking process and just as susceptible of being skewed by the prospect of judicial second guessing as any other part of the process. Thus, the Commissioner's decisions both involved an element of judgment or choice, and were the kind of choices "that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536.

C.

The plaintiffs attempt to avoid application of the discretionary function exception by looking behind the

injury-causing decision and finding fault with an aspect of the data on which it may have been based. The gist of their complaint is that the FDA's Philadelphia laboratory's tests were negligently performed because the procedures used conformed neither to the FDA's Regulatory Procedures Manual nor to good laboratory practices generally. Thus, the plaintiffs claim, their complaint is "based on" the behavior of the laboratory technicians and not on the FDA Commissioner's decisions to bar fruit from Chile and to remove it from the marketplace. The methods employed by the laboratory technicians while testing the grapes, they argue further, did not involve "the permissible exercise of policy judgment," *Berkovitz*, 486 U.S. at 537, and accordingly were not themselves protected by the discretionary function exception.

We acknowledge that simply as a matter of semantics, it is possible to characterize the plaintiffs' claims as being "based upon" the conduct of the Philadelphia laboratory technicians. We nevertheless reject that proposed characterization because it is inconsistent with the purpose of the discretionary function exception.

The plaintiffs emphasize that this case comes to us on a grant of a motion to dismiss, and that we must accept their version of the facts as true. This is, of course, an accurate statement of the law. But the fact that we must accept the plaintiffs' version of the facts as true does not mean that we must accept plaintiffs' *characterization* of those facts. We know of no authority for the proposition that plaintiffs, by the manner in which they draft their complaints, may dictate that their claims are "based upon" one government employee's actions and not another's. The relevant authority is to the contrary. *Cf. United States v. Neustadt*, 366 U.S. 696, 703-06 & n.13 (1961) (holding that federal law, not state law or the language of plaintiff's complaint, governs the applicability of 28 U.S.C. § 2680(h)'s retention of sovereign immunity in cases where the plaintiff's claim "arise[s] out of . . . misrepresentation"); *Kosak v. United States*, 465 U.S. 848, 851-62 (1984) (whether plaintiff's claim "aros[e] in respect of . . . the detention of any goods or merchandise by any officer of customs" for the purposes of 28 U.S.C. § 2680(c) is an independent question of federal

law the resolution of which depends on the terms and purposes of the FTCA).

The reality here is that the injuries of which the plaintiffs complain were caused by the Commissioner's decisions and, as a matter of law, their claims are therefore "based upon" those decisions. Any other view would defeat the purpose of the discretionary function exception. In situations like this where the injury complained of is caused by a regulatory policy decision, the fact of the matter is that there is no difference in the quality or quantity of the interference occasioned by judicial second guessing, whether the plaintiff purports to be attacking the data base on which the policy is founded or acknowledges outright that he or she is challenging the policy itself.

If plaintiffs injured by regulatory policy decisions were permitted to prosecute damage actions by challenging the manner in which the underlying data was collected, federal courts, of necessity, would be required to examine in detail the decisionmaking process of the policymaker to determine what role the challenged data played in the policymaking and what the policymaker's decision would have been if he or she had received the unchallenged data but not the challenged data (or had received other data in lieu of the challenged data). Without such an examination and all of the discovery that would necessarily precede it, a plaintiff in the position of these plaintiffs would be unable to prove a causal link between the alleged negligence and the alleged injury. Yet this is precisely the kind of inquiry that the Supreme Court sought to foreclose when it ruled out any inquiry into an official's "subjective intent in exercising the discretion conferred by statute or regulation." *Gaubert*, 499 U.S. at 325.

The social cost of permitting the inquiries required by the plaintiffs' theory are prohibitive. First, because the liability-creating decision might be a policy choice at the very highest level of a regulatory agency, the number of persons affected by the decision is potentially staggering and the potential liability virtually unlimited. Second, because of the nature of the inquiry, the demands of the litigation process on the most valuable human resources of the

regulatory agency will be extraordinary. But this is only a part of the picture.

As we have earlier suggested, every policy decision involves an exercise of the policymaker's judgment about the reliability, adequacy, and significance of the information available to him or her. Because of time and expense constraints and because experience teaches that human beings make mistakes in technique, perception, logic, communication, and a myriad of other areas, no decisionmaker can have one hundred percent confidence in the information before him or her at any given point in time. Each responsible decision therefore necessarily reflects the decisionmaker's judgment that it is more desirable to make a decision based on the currently available information than to wait for more complete data or more confirmation of the existing data.

When one appreciates that virtually all policymaking involves judgments about the reliability of the available data, it is not difficult to predict the impact upon policymakers that would result from the fear of virtually unlimited liability and the prospect of virtually interminable litigation associated with the plaintiffs' theory of liability. The "safest" course from the decisionmaker's personal perspective will be to wait for more conclusive data. But that course can carry a very high social cost. This is graphically illustrated by asking what will happen the next time a Commissioner of the FDA has to make decisions like those here involved if the current Commissioner is exposed to this litigation and the United States government is found liable for all the losses here alleged. We believe the discretionary function exception was intended to make sure every Commissioner's judgment will not be skewed by such considerations.

D.

The plaintiffs rely principally on two Supreme Court decisions: *Berkovitz v. United States*, 486 U.S. 531 (1988), and *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). In *Berkovitz*, the plaintiff had contracted polio from a dose of polio vaccine. The decisions alleged to have caused the

plaintiff's injury were a decision to license the manufacture of the lot from which that plaintiff's dose of vaccine came and the decision to release that lot for use by the public. The Supreme Court held that the discretionary function exception would not protect those decisions if they were contrary to a previously-established policy which left no discretion to the decisionmakers. Thus, where the policy previously established by statute and regulation deprived the agency of the authority to license a manufacturer without insisting that it submit specified data to the agency, a decision to license without requiring that submission was not a protected exercise of a discretionary function. Similariy, if a previously determined policy established objective scientific criteria for release of a lot and deprived the agency of discretion to release a lot not meeting those standards, damage liability could be imposed for a decision to release a lot not meeting those criteria.

The cases before us, unlike *Berkovitz*, are not cases in which the injury-causing decision was contrary to a previously established policy which deprived the decisionmaker of discretion. The policy previously established by Congress and the FDA called for the Commissioner to make a discretionary decision on whether the public health required a quarantine of Chilean fruit. The plaintiffs have pointed to no statute or regulation that the Commissioner's decision violated. The best they can do is reach behind the Commissioner's decision and point to a laboratory manual that allegedly called for the retention of a portion of the first two perforated, white-ringed grapes. But clearly the laboratory manual was not intended to deprive the Commissioner of the discretion to make the decision that he made on March 13 based on the information available to him at the time.

In *Indian Towing*, the plaintiff had been injured as a result of the negligent operation of a lighthouse by the Coast Guard. The Court held that although the Coast Guard had no obligation to undertake lighthouse service, once it exercised its discretion to do so, it was obliged to exercise due care. The Court has recently described the basis for decision in *Indian Towing* as follows:

> The United States was held liable . . . because making sure the light was operational "did not involve any permissible exercise of policy judgment." . . . Indeed, the Government did not even claim the benefit of the exception but unsuccessfully urged that maintaining the light was a governmental function for which it could not be liable.

United States v. Gaubert, 499 U.S. at 326.

The plaintiffs argue that just as the government, after making the discretionary decision to provide lighthouse services, could not thereafter provide those services negligently, so too the government here, after making a discretionary decision to test incoming Chilean fruit, could not thereafter fail to exercise care in doing the testing. Besides the fact that the discretionary function exception was not at issue in *Indian Towing*, the plaintiffs miss the critical distinction between that case and this. The plaintiff in *Indian Towing* was injured by the negligently performed lighthouse services and his case accordingly required an inquiry only into how those services were delivered, not into the exercise of policymaking discretion. Here the plaintiffs would not have been injured but for the decisions of the Commissioner and litigation of their cases will require extensive inquiry into the process by which those decisions were made. Once a policy decision has been made negligence in its non-discretionary execution can give rise to FTCA liability without jeopardizing the interests the discretionary function exception is designed to protect. Those interests would be jeopardized, however, by allowing these plaintiffs to go forward. *Cf. Patterson v. United States*, 881 F.2d 127, 128 (4th Cir. 1989) (in banc) (holding that plaintiffs may not base claim on the non-discretionary action of an Office of Surface Mining ("OSM") inspector because that action was followed by a decision by the OSM not to take further action).

III.

For the foregoing reasons, we will affirm the order of the district court dismissing the complaints in these cases.

ROTH, *Circuit Judge*, *dissenting*: Judges Becker, Hutchinson, Scirica, Lewis and McKee join in the dissent.

I respectfully dissent from the conclusion reached by the majority. I cannot accept cloaking a decision, which results from negligently performed laboratory work, with the discretionary function exception under circumstances in which the decision maker would expect, first, that the laboratory work will be performed under scientifically recognized and accepted techniques and, second, that further actions by the decision maker will be governed by the results of that testing.

Because I conclude that such circumstances have been alleged by the plaintiffs in their complaint, I find it improper for the district court to have dismissed the complaint on the basis of the discretionary function exception.

In ruling on defendants' motions to dismiss, the district court focused on the conduct of the FDA as a whole. It conducted an analysis of the statutes and regulations governing the FDA, and concluded that

> [u]nder this authorization, FDA had the discretion to act during the Chilean grape crisis. The FDA acted to protect the public from the risk of exposure to poisonous fruit which it learned could be coming from Chile. It had the discretion to test the fruit and determine whether the fruit was adulterated. It also had the discretion to refuse entry into the United States. The actions taken were not violative of any regulatory or statutory provisions. The acts taken were in accordance with the FDA's authority to determine whether or not a specific product should be allowed entrance into the United States. This conduct is grounded in the policy of protecting the public health. The actions were clearly in furtherance of the FDA's statutory mission to protect the American public from adulterated food. All the acts involved judgment and choice and were grounded in policy.

Balmaceda v. United States, 815 F. Supp. 823, 827 (E.D. Pa. 1992). The district court declined to "consider alleged violations of a laboratory procedures manual because this

argument simply is the basis of the plaintiffs' claim of negligence." *Id.* at 826.

I believe, however, that, in analyzing the actions taken here by the FDA, one must consider carefully whether it is implicit in the order for tests to be performed that the tests are both scientifically accepted and reliable. If it is implicit, I would not extend the discretionary function exception to actions which predictably follow from the test results. The discretionary function exception should not protect an official's decisions, brought about by the results of accepted and reliable tests, just as it will not protect an official's release of a noncomplying lot of polio vaccine. *See Berkovitz by Berkovitz v. United States*, 486 U.S. 531 (1988).

Moreover, if actions are taken as a result of accepted and reliable testing, they may no longer be the product of independent judgment. The determination to order testing involved the element of choice. However, it is not clear from the record before us whether any significant discretion to choose remained after the decision to test or whether a positive test result would implicate a concomitant decision to withdraw the fruit from the market. If plaintiff can prove the existence of such inevitability, the discretionary function exception may no longer be implicated. *Accord Westfall v. Erwin*, 484 U.S. 292, 296-97 (1988) ("When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct.").

I do not question the majority's conclusion that the Commissioner's action in ordering the testing was discretionary. I believe, however, that the majority's view of the case misapprehends the precise nature of plaintiffs' claims under the FTCA. Plaintiffs do not argue that the initial decision to test was not a protected discretionary function. What plaintiffs do argue is that the decision to withdraw Chilean fruit from the market was proximately caused by the positive test results. Plaintiffs contend that the tests performed by the FDA's Philadelphia laboratory were negligently performed in that the procedures used conformed neither to the FDA's Regulatory Procedures Manual nor to good laboratory practices. Their complaints allege that, "as a result of the negligent analysis performed

and reported by the Philadelphia laboratory, the FDA decided to take three actions: 1) refusing entry into the United States of all Chilean fruit; 2) forcing a market withdrawal of all Chilean fruit already in distribution channels; and 3) issuing a press release informing consumers to refrain from eating Chilean fruit." Joint Appendix at 169. Thus, plaintiffs do not challenge the FDA Commissioner's decisions to test fruit from Chile or, based upon properly performed testing, to take action to remove all Chilean fruit from the marketplace.

Because we are considering a motion to dismiss, we must accept as true all of the factual allegations in the complaints. *Berkovitz*, 486 U.S. at 540, 108 S. Ct. at 1961. For present purposes, there was no cyanide in the grapes, the FDA technicians were negligent in reaching the conclusion that there was cyanide contamination, and this negligence was the cause-in-fact and proximate cause of the damage to plaintiffs. Moreover, there is no contention here that the actions of the laboratory technicians, in testing the grapes, involved the permissible exercise of policy judgment. The technicians are not protected by the exception.

In *Berkovitz*, the Supreme Court stated that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Id.* at 536, 108 S. Ct. at 1958-59. In this case, the plaintiffs allege that the Regulatory Procedures Manual established procedures to be followed for tests such as those performed at the Philadelphia lab and provided that any modification to those procedures be reduced to writing. Plaintiffs contend that the lab technicians violated the manual's specific instructions in failing to reserve portions of the two punctured grapes for confirmatory testing and in failing to make contemporaneous records of their observations.

The majority speculates that, after receiving the test results, the Commissioner was required to make a judgment about the conflicting findings of the Philadelphia and Cincinnati laboratories and to judge the significance of

the Philadelphia laboratory's failure to follow established procedures. *See* Majority page 11. These contentions, however, do not appear in the complaint. In the record before the district court on the motion to dismiss, such speculation would be inappropriate. Plaintiffs' allegations do, however, permit the conclusion that the decision to withdraw Chilean fruit from the market followed as a result of the negligent testing.

I find that such an allegation satisfies the pleading requirements of *Berkovitz*. Moreover, in *Berkovitz*, which concerned, *inter alia*, a claim that the Division of Biologic Standards (DBS) of the National Institutes of Health had wrongfully licensed the production of a polio vaccine, the Court made the following observation:

> If petitioners' claim is that the DBS made a determination that [the vaccine] complied with regulatory standards, but that the determination was incorrect, . . . the question turns on whether the manner and method of determining compliance with the safety standards at issue involve agency judgment of the kind protected by the discretionary function exception. Petitioners contend that the determination involves the application of objective scientific standards, . . . whereas the Government asserts that the determination incorporates considerable "policy judgment" . . . . In making these assertions, the parties have framed the issue appropriately; application of the discretionary function exception to the claim that the determination of compliance was incorrect hinges on whether the agency officials making that determination permissibly exercise policy choice.

Id. at 544-45, 108 S. Ct. at 1963 (footnote omitted). As this passage makes clear, judgment guided purely by scientific or other objective principles does not involve discretion for purposes of the discretionary function exception. *See also Griffin v. United States*, 500 F.2d 1059, 1066 (3d Cir. 1974) ("Where the conduct of Government employees in implementing agency regulations requires only performance of scientific evaluation and not the formulation of policy, we do not believe that the conduct is immunized from judicial review as a 'discretionary function.'"); *Ayala v. United*

States, 980 F.2d 1342, 1349-50 (10th Cir. 1992) ("We fail to see how the determination in this case can be labeled a policy decision. The choice was governed, as plaintiffs contend, by 'objective principles of electrical engineering.' ").

In *Berkovitz*, the specifications for licensing vaccine or releasing lots of vaccine had been incorporated in procedures and regulations. In the present case, the Commissioner did not have specific procedures established for handling fruit to determine if it had been contaminated. Nevertheless, the plaintiffs allege that the technicians' sole purpose in testing the suspect grapes was to determine whether they had been injected with cyanide. Appellants' claim that the technicians were provided with precise, objective, scientific standards to use in the testing. Any decisions made in the course of testing concerning what portions of the grapes to test or how to conduct the tests should have been made solely with reference to these principles of science. I am not persuaded that this situation is significantly different from that in *Berkovitz*.

Social, economic, and political factors—those involved in the kinds of decisions Congress intended to shield from liability—had no place in the decision making process once the Commissioner decided to order testing. Consequently, if the district court were to adjudicate this case as it is alleged in the complaint by plaintiffs, the court would not be "second-guessing" a policy-based decision. Instead, by measuring the technicians' conduct against the procedures they were to have followed and principles of good laboratory practice, it would be undertaking the sort of inquiry that courts are called on to make all the time.

Moreover, I do not find it significant that the conduct challenged here was embedded within the clearly discretionary consideration of whether to test incoming fruit or to remove all Chilean fruit from the market. With respect to the decision to test fruit in the first place, I am guided by the body of law "holding that once the government makes a policy decision protected by the discretionary function exception, it must proceed with due care in the implementation of that decision." *Caplan v. United States*, 877 F.2d 1314, 1316 (6th Cir. 1989). This line of cases has grown out of the Supreme Court's decision in *Indian Towing*

Co., Inc. v. United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), which concerned an action against the Coast Guard for negligent operation of a lighthouse. The Court stated:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Id. at 69, 76 S. Ct. at 126-27. In this case, once the FDA exercised its discretion to test incoming Chilean fruit, it incurred the obligation to use due care in doing so.

Nor am I led to a different result by the fact that the alleged negligence in the laboratory was followed by a decision that was, at the very least, a "but for" cause of the harm to plaintiffs.[1] I am not persuaded by the majority's

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1. While I suspect that plaintiffs may encounter difficulty in attempting to prove that the alleged negligence of the lab technicians, rather than the Commissioner's decision, was the proximate cause of their injuries, I cannot allow that perception to color my analysis here. Instead, I must accept the allegations in plaintiffs' complaints as true. Those allegations are directed at harm allegedly caused to plaintiffs by the negligent testing. The district court may appropriately consider causation in subsequent stages of these proceedings, such as in deciding whether to grant a motion for summary judgment. *See Appley Brothers v. United States*, 7 F.3d 720, 725 and n.2 (8th Cir. 1993) (Reversing district court's dismissal of suit, pursuant to discretionary function exception, on ground that plaintiffs based their claim on Department of Agriculture's negligent inspection of warehouse rather than on USDA's decision whether or not to revoke warehouse license; as to the issue of causation, the court of appeals held that the "question of whether appellants failed to state a cause of action was not before the district court, and is not an issue in this appeal."). I believe, however, that the factor of causation has no place in my consideration of whether the discretionary function exception applies to plaintiffs' allegations as they are presently expressed in the complaint.

contention that the possibility of liability will have an undesirable effect on policymakers who find themselves in a position analogous to that of the FDA Commissioner in this case. Because there is an obligation to use due care in operating a lighthouse or licensing a polio vaccine or testing a grape for cyanide, decisions arising from the execution of that duty must be based upon the proper performance of that duty. The desired result is that the purely technical aspects of any such decision will be properly conducted. If there is a chilling effect, as the majority fears there will be, the chill must be directed to ensure the non-negligent operation of the lighthouse or the non-negligent licensing of the polio vaccine or the non-negligent examination of the grapes. Just as the requirements for licensing a polio vaccine are discretionary but the steps to determine that a particular batch of vaccine is properly licensable are not discretionary, so too the removal from the market of cyanide-contaminated grapes may be discretionary but the proper performance of established tests to detect the contamination is not.

In effect, I see no reason to believe that a finding of liability against the government in this case would have consequences of a different nature or to a greater extent than a finding of liability against the government in either *Indian Towing* or *Berkovitz*. When an official makes a policy decision—to build a lighthouse or to license a vaccine or to remove fruit from the market—the possibility of tort liability may factor into the analysis. However, the focus of that consideration should be the ability of the government to perform the tasks which follow from the decision to implement the action. If the government agency cannot reasonably expect to be able non-negligently to operate a lighthouse or to license a vaccine or to test a grape for cyanide, this factor should be considered in instituting the line of action in the first place. If testing grapes for cyanide were difficult or the results of such testing not reliable, the Commissioner might better exercise his discretion by withdrawing grapes from the market without having them tested. However, once the decision was made to do the testing, the discretionary function exception should not protect the government from the consequences of the

negligence of the laboratory technicians in performing their routine duties.

For the above reasons, I would reverse the dismissal of this case by the district court and would remand it for further proceedings.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 93-1182; 93-1205 93-1206;
93-1207; 93-1208; 93-1209

FISHER BROS. SALES, INC.
Appellant in 93-1182.

v.

UNITED STATES OF AMERICA

JULIA SAAVEDRA BALMACEDA; AANDRES MUNOZ TORRES;
ABALOS LABBE JUAN PABLO; ABATTE OSORIO HONS.;
ABDON M. ALVAREZ; ABRAHAM SABAJ NALLAR;
ABRIGO OLIVOS RODEMIL;
ACEVEDO DURAN OSVALDO HERNAN;
ACOSTA RAMIREZ CARLOS;
VICTORIANO ACUNA CONTRERAS;
MARCO HERIBETO ACUNA MONTERO;
JAVIER ACUNA GONZALEZ;
MARDONES ADOLFO RIVEROS;
ADRIANA RODRIGUEZ LARRAGANA;
AGR HENRIQUEZ Y VARELA; AGR KIWI MASTERS LTDA;
AGRIC MORANDE LAVIN LTDA; AGRIC CAIQUENES LTDA;
AGRIC CARVALLO LTDA; AGRIC CERRILLO LTDA;
AGRIC CHOROMBO LTDA;
AGRIC COTIELLA LTDA; AGRIC DEL ALTO LTDA;
AGRIC DEL VALLE LTDA;
AGRIC EL ESPINO N12, et al.
Appellants in 93-1205,

v.

UNITED STATES OF AMERICA

CARBEN, INC.,
Appellant in 93-1206

v.

UNITED STATES OF AMERICA

COMPANIA SUD AMERICANA DE VAPORES S.A.,
Appellant in 93-1207.

v.

UNITED STATES OF AMERICA

NEW MARKET INVESTMENT CORPORATION,
Appellant in 93-1208.

v.

UNITED STATES OF AMERICA

GUZMAN Y DEL REAL, LIMITRADA,
individually and as class representative,

v.

UNITED STATES OF AMERICA
Guzman Y Del Real, Limitrada,
Appellant in 93-1209.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action Nos. 92-02818; 92-00907;
92-01204; 92-01208; 92-01279; 92-04057)

Argued: September 23, 1993

Before: STAPLETON ROTH and LEWIS, *Circuit Judges*

Reargued in banc October 18, 1994
Before: SLOVITER, *Chief Judge,* BECKER, STAPLETON
MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, LEWIS and McKEE, *Circuit Judges*
Nos. 93-1182, 93-1205, 93-1206, 93-1207, 93-1208 & 93-1209

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on September 23, 1993 and reargued *in banc* October 18, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court dismissing the complaints dated December 29, 1992 and entered December 30, 1992 on the individual dockets in appeal Nos. 93-1182, 93-1205, 93-1207, and 93-1209 and entered December 31, 1992 on the individual dockets in appeal Nos. 93-1206 and 93-1208, be, and the same are hereby affirmed. Costs taxed against appellant in each of the appeals. All of the above in accordance with the opinion of this Court.

ATTEST:

P. Douglas Sisk

Clerk

Dated: January 25, 1995

Filed February 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1182; 93-1205; 93-1206;
93-1207; 93-1208; 93-1209

FISHER BROS. SALES, INC.

Appellant in 93-1182.

v.

UNITED STATES OF AMERICA

JULIA SAAVEDRA BALMACEDA; AANDRES MUNOZ TORRES; ABALOS LABBE JUAN PABLO; ABATTE OSORIO HONS.; ABDON M. ALVAREZ; ABRAHAM SABAJ NALLAR; ABRIGO OLIVOS RODEMIL; ACEVEDO DURAN OSVALDO HERNAN; ACOSTA RAMIREZ CARLOS; VICTORIANO ACUNA CONTRERAS; MARCO HERIBETO ACUNA MONTERO; JAVIER ACUNA GONZALEZ; MARDONES ADOLFO RIVEROS; ADRIANA RODRIGUEZ LARRAGANA; AGR HENRIQUEZ Y VARELA; AGR KIWI MASTERS LTDA; AGRIC MORANDE LAVIN LTDA; AGRIC CAIQUENES LTDA; AGRIC CARVALLO LTDA; AGRIC CERRILLO LTDA; AGRIC CHOROMBO LTDA; AGRIC COTIELLA LTDA; AGRIC DEL ALTO LTDA; AGRIC DEL VALLE LTDA; AGRIC EL ESPINO N12, et al.

Appellants in 93-1205.

v.

UNITED STATES OF AMERICA

CARBEN, INC.,

Appellant in 93-1206.

v.

UNITED STATES OF AMERICA

COMPANIA SUD AMERICANA DE VAPORES S.A.,

Appellant in 93-1207.

v.

UNITED STATES OF AMERICA

NEW MARKET INVESTMENT CORPORATION,

Appellant in 93-1208.

v.

UNITED STATES OF AMERICA

GUZMAN Y DEL REAL, LIMITRADA,
individually and as class representative,

v.

UNITED STATES OF AMERICA,

Guzman Y Del Real, Limitrada,

Appellant in 93-1209.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action Nos. 92-02818; 92-00907; 92-01204;
92-01208; 92-01279; 92-04057)

Argued: September 23, 1993

Before: STAPLETON, ROTH and LEWIS,
Circuit Judges

(Opinion Filed February 25, 1994)

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OPINION OF THE COURT

ROTH, *Circuit Judge*:

These cases concern the "Chilean Grape Crisis" of 1989. The crisis began on March 2 of that year when the United States Embassy in Santiago, Chile, received an anonymous phone call in which the caller indicated that Chilean fruit destined for the United States would be injected with cyanide. This led the Food and Drug Administration (FDA) to increase its scrutiny of incoming Chilean fruit. On March 12, tests conducted by the FDA's Philadelphia laboratory revealed the presence of cyanide in two Chilean grapes. Based on these tests, the FDA announced that Chilean fruit had been contaminated and took steps to remove all Chilean fruit from the U.S. market.

Plaintiffs in these cases are approximately 2,400 Chilean growers and exporters of fresh fruit; a Chilean shipping line; a Florida corporation, a New York corporation, and a successor in interest to a Pennsylvania corporation, all of which are engaged in the importation and distribution of fresh produce; and a non-certified class whose named plaintiff is a Chilean fruit grower. These plaintiffs seek damages against the United States under the Federal Tort Claims Act (FTCA). They contend that technicians in the Philadelphia laboratory negligently conducted the testing of the grapes by failing to comply with the FDA's Regulatory Procedures Manual or to follow good laboratory practices. This negligence, they argue, led to the FDA's decision to remove Chilean fruit from the U.S. market, which in turn caused the destruction of the Chilean fruit business for the spring season of 1989 and the decimation of the Chilean economy.

On December 29, 1992, the district court entered orders dismissing the complaints in these cases. It reasoned that it lacked subject-matter jurisdiction over the claims based on its conclusion that the discretionary function exception to the FTCA shielded the government's conduct from liability. Because we believe that the district court

improperly applied the discretionary function exception to plaintiffs' claims, we will reverse.

I.

On March 2, 1989, an anonymous caller to the United States Embassy in Santiago, Chile, stated that Chilean fruit bound for the United States would be injected with cyanide. The FDA took the lead agency role in evaluating the seriousness of the call, and it detained all incoming Chilean fruit over the weekend of March 4 and 5 while it undertook its investigation. On March 6, based on a lack of evidence that any fruit had actually been poisoned, the FDA announced that it considered the call a hoax. It nevertheless continued to conduct experiments concerning the effects that cyanide injections would have on various Chilean fruits.

On the day following the announcement, the embassy in Santiago received a second anonymous call. The caller indicated that he had access to orchards, storage facilities, and shipping locations in Chile, and stated that unidentified fruit had already been injected with cyanide. In response, on March 11, the FDA's Philadelphia District Office doubled the inspection level on incoming Chilean fruit, beginning with that arriving on the "Almeria Star." Certain portions of the fruit arriving on that vessel were designated to be examined, and any that looked "suspect" was sent to the Philadelphia District Office for testing.

On the morning of March 12, 1989, an FDA inspector reported finding two grapes from the "Almeria Star" which appeared to have been punctured, and which displayed uniform white rings. The physical appearance of these grapes was dissimilar to, and inconsistent with, that of grapes injected with cyanide during FDA experimentation.[1]

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1. FDA technicians photographed all grapes prior to testing them. According to the complaint, these photographs confirm that the grapes' appearance was different from, and inconsistent with, the appearance of grapes that the FDA had contaminated with cyanide. The FDA found that the internal pressure of a grape forces cyanide to the surface, causing the grape to become shriveled and discolored. None of the grapes it had injected with cyanide developed white rings.

Further examination of the crate containing the suspect grapes revealed a third white-ringed grape, though it appeared to have been slit rather than punctured. These grapes, as well as the crate in which they came, were sent to the FDA's Philadelphia laboratory.

The laboratory began testing the grapes for the presence of cyanide in the early afternoon on March 12. Rather than saving any portion for confirmation testing, the FDA technicians used all of the two punctured grapes in conducting their tests. They instead saved the third grape, which appeared to have been slit rather than punctured, for confirmation purposes. The testing process required the grapes to be mashed until they turned into a solution. Sulfuric acid was then added to the solution, causing a chemical reaction that released in gaseous form any cyanide that was present in the solution. The gas released from the solution was exposed to two cyanide-sensitive strips of reactive paper, both of which indicated the presence of cyanide. This was followed by a test designed to measure the amount of cyanide present, which not only indicated the presence of cyanide in the solution, but also revealed an unexpectedly high concentration of cyanide for grapes presumed to have been contaminated in Chile at least two weeks prior to the testing.[2] At approximately 9:30 p.m. on March 12, the Philadelphia laboratory orally reported positive cyanide test results from the solution to the FDA's Emergency Operations Center.

Meanwhile, a portion of the solution, along with the third, slit grape and the bunch in which these grapes had been found, was transferred to the FDA's Cincinnati laboratory.

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2. According to the complaints, cyanide injected into grapes dissipates rapidly, so that only 10% remains after a few hours. In the time required to transport fruit from Chile to the United States, more than 99% of the cyanide would have dissipated. Moreover, the first test performed by the FDA leads to a further reduction in the amount of cyanide present. Based on these factors, plaintiffs contend that in order to contain the amount of cyanide the second test revealed, the grapes would have to have been injected with an amount of cyanide that it was scientifically impossible for them to have retained. Such a large amount of cyanide would have inevitably oozed out of the grape from the point of injection and contaminated other grapes in the same box.

Technicians there identified two additional white-ringed grapes on the bunch. Tests conducted on the solution, the slit grape, and the two additional white-ringed grapes showed no presence of cyanide. Thus, the Cincinnati laboratory could not confirm the Philadelphia laboratory's results, and in fact reported that they had detected no cyanide in their portion of the solution, in the slit grape, or in the additional white-ringed grapes.

Both laboratories continued testing. The Philadelphia laboratory tested other grapes from the crate in which the suspect grapes were found, as well as all packing materials in that crate. None of the tests revealed the presence of cyanide. The Cincinnati laboratory performed analyses that demonstrated that the white rings on the two additional ringed grapes bore no relation to any contamination by cyanide.

The oral report of a positive cyanide finding from the Philadelphia laboratory was never withdrawn. On the basis of that report, the FDA on March 13 refused entry of any additional Chilean fruit into the U.S., required the withdrawal and destruction of all Chilean fruit then in channels of distribution, and issued a press release publicizing the Philadelphia laboratory's finding of cyanide in two Chilean grapes and the order refusing the entry of Chilean fruit into the United States. Consumers were encouraged to destroy any Chilean fruit in their possession, and grocers were instructed to remove all such fruit from their shelves. As a result, the U.S. market for Chilean fruit was destroyed at the height of the import season, and the international market for such fruit was severely depressed.

Plaintiffs contend that the technicians in the FDA's Philadelphia laboratory were negligent in failing to reserve any portion of the two punctured grapes for later confirmation testing. Instead, the technicians set aside the third, slit grape for confirmation purposes, in violation of the FDA's Regulatory Procedures Manual as well as of good laboratory practices. As a result, the lab was unable to determine whether the positive result might have been due to some other factor, such as the cyanide used to calibrate the testing instruments. Plaintiffs further allege that the lab technicians were negligent in failing to record their

observations contemporaneously with their testing, thereby casting doubt on the accuracy of their results and the content of the oral report, and in failing to take account of the known properties of cyanide in fruit.

II.

Plaintiffs in each of the cases comprising this appeal invoked the district court's subject matter jurisdiction under 28 U.S.C. § 1346(b). We have jurisdiction pursuant to 28 U.S.C. § 1291, as plaintiffs are appealing from a final judgment of the district court dismissing their claims for lack of subject matter jurisdiction. Plaintiffs in each case filed timely notices of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1).

"The scope of review of the applicability of the discretionary function exception is plenary." *United States Fidelity & Guar. Co. v. United States*, 837 F.2d 116, 119 (3d Cir.), *cert. denied*, 487 U.S. 1235 (1988). Because these cases were dismissed pursuant to motions attacking the pleadings, we must accept as true all of the factual allegations in the complaints. *Berkovitz v. United States*, 486 U.S. 531, 540, 108 S.Ct. 1954, 1961, 100 L.Ed.2d 531 (1988).

III.

A.

The Federal Tort Claims Act gives district courts jurisdiction over

> civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The FTCA thus waives the government's sovereign immunity with respect to tort actions against the United States seeking money damages.

This waiver of the government's immunity is, however, subject to certain exceptions, one of which is the discretionary function exception, which prohibits:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984). "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814. As this court has noted, the exception is a product of Congress' recognition that "the imposition of liability for damages occasioned by governmental policymaking would necessarily involve a very substantial, if not prohibitive, social cost not only in terms of the imposed liability itself, but also in terms of the constraining effect of that liability on the decisions of governmental policymakers." *Sea-Land Serv., Inc. v. United States*, 919 F.2d 888, 890 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991).

The Supreme Court has fashioned a two-part test to be used in determining whether the discretionary function exception applies to a claim under the FTCA. "[A] court must first consider whether the action is a matter of choice for the acting employee.... [C]onduct cannot be

discretionary unless it involves an element of judgment or choice." *Berkovitz*, 486 U.S. at 536, 108 S.Ct. at 1958. The Court has instructed that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764. If a court finds that the conduct in question was discretionary, it must then consider whether the element of judgment involved in the exercise of discretion "is of the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 813, 108 S.Ct at 1959. In light of the policies animating the exception, "properly construed, [it] protects only governmental actions and decisions based on considerations of public policy." *Id.* at 537, 108 S.Ct at 1959.

Thus, in determining whether a complaint ought to be dismissed for lack of subject matter jurisdiction based on the applicability of the discretionary function exception, a court must first determine whether the challenged actions involve the requisite element of choice, and then whether the complaint

> allege[s] facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

United States v. Gaubert, 499 U.S. 315, 324-25, 111 S.Ct. 1267, 1275, 113 L.Ed.2d 335 (1991).

B.

In ruling on these motions to dismiss, the district court focused on the conduct of the FDA as a whole. It conducted an analysis of the statutes and regulations governing the FDA, and concluded that

> [u]nder this authorization, FDA had the discretion to act during the Chilean grape crisis. The FDA acted to

> protect the public from the risk of exposure to poisonous fruit which it learned could be coming from Chile. It had the discretion to test the fruit and determine whether the fruit was adulterated. It also had the discretion to refuse entry into the United States. The actions taken were not violative of any regulatory or statutory provisions. The acts taken were in accordance with the FDA's authority to determine whether or not a specific product should be allowed entrance into the United States. This conduct is grounded in the policy of protecting the public health. The actions were clearly in furtherance of the FDA's statutory mission to protect the American public from adulterated food. All the acts involved judgment and choice and were grounded in policy.

Balmaceda v. United States, 815 F.Supp. 823, 827 (E.D.Pa. 1992). It declined to "consider alleged violations of a laboratory procedures manual because this argument simply is the basis of the plaintiffs' claim of negligence." *Id.* at 826. On appeal, the United States encourages us to adopt this position. It argues that the FDA Commissioner's actions during the Chilean grape crisis had clear statutory authorization and therefore fell squarely within the scope of the discretionary function exception.

We do not question the accuracy of the conclusion that the Commissioner's actions were discretionary. We believe, however, that this view of the case misapprehends the precise nature of plaintiffs' claims under the FTCA. Plaintiffs do not argue that the initial decision to test was not a protected discretionary function. Nor do they argue that a decision to withdraw Chilean fruit from the market, if that decision were based upon properly performed tests, was not discretionary. Plaintiffs contend, however, that the tests performed by the FDA's Philadelphia laboratory were negligently performed in that the procedures used conformed neither to the FDA's Regulatory Procedures Manual nor to good laboratory practices. Their complaints allege that, "as a result of the negligent analysis performed and reported by the Philadelphia laboratory, the FDA decided to take three actions: 1) refusing entry into the United States of all Chilean fruit; 2) forcing a market

withdrawal of all Chilean fruit already in distribution channels; and 3) issuing a press release informing consumers to refrain from eating Chilean fruit." Joint Appendix at 169. Thus, plaintiffs do not challenge the FDA Commissioner's decisions to test fruit from Chile or, based upon properly performed testing, to take action to remove all Chilean fruit from the marketplace. While these decisions surely impact upon the determination whether the negligent testing of the grapes can be said to have been the legal cause of the harm to plaintiffs, they are not relevant to our inquiry here.[3]

As noted above, because we are considering a motion to

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3. We agree with the dissent that the FDA Commissioner's decision to remove the Chilean fruit from the marketplace was policy-based and thereby falls squarely within the discretionary function exception. We disagree, however, with the dissent's focus on the Commissioner's decision and its role as the cause of plaintiffs' injuries. While we suspect that plaintiffs may encounter difficulty in attempting to prove that the alleged negligence of the lab technicians, rather than the Commissioner's decision, was the proximate cause of their injuries, we cannot allow that perception to color our analysis here. Instead, we must accept the allegations in plaintiffs' complaints as true. Those allegations are directed at harm allegedly caused to plaintiffs by the negligent testing. The district court may appropriately consider causation in subsequent stages of these proceedings, such as in deciding whether to grant a motion for summary judgment. We believe, however, that such factors have no place in our consideration of whether the discretionary function exception applies to plaintiffs' allegations as they are presently expressed in the complaint.

While some might criticize us for forcing the parties to go through the additional step of examining causation before this Court may in fact arrive at the same conclusion that the dissent espouses at this stage, *i.e.*, dismissal, we feel that omitting that step in the proceedings of this case would distort the contours of the discretionary function exception by conflating the allegations against the lab technicians with the effects of the discretionary decision made by the Commissioner. Nor do we agree with the dissent's conclusion that, if a decision is a discretionary one, the courts are *a fortiori* prevented from reviewing the adequacy of the information upon which the decision was based. Consistent with our reasoning in Part C, *infra*, we conclude that whether the negligent act is pre- or post-decision should not necessarily alter our analysis of the applicability of the exception.

dismiss, we must accept as true all of the factual allegations in the complaints. *Berkovitz*, 486 U.S. at 540, 108 S.Ct. at 1961. Thus, for present purposes, there was no cyanide in the grapes, the FDA technicians were negligent in reaching the conclusion that there was cyanide contamination, and this negligence was the cause-in-fact and proximate cause of the damage to plaintiffs. All that remains for us to determine is whether the lab technicians' actions in performing scientific tests on the grapes fall within the discretionary function exception to the FTCA. The question we must answer, then, is whether the testing of the suspect grapes involved "the permissible exercise of policy judgment." *Id.* at 537, 108 S.Ct. at 1959.

In *Berkovitz*, the Supreme Court stated that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Id.* at 536, 108 S.Ct. at 1958-59. In this case, the Regulatory Procedures Manual established procedures to be followed for tests such as those performed at the Philadelphia lab and provided that any modification to those procedures be reduced to writing. Plaintiffs allege that the lab technicians violated the manual's specific instructions in failing to reserve portions of the two punctured grapes for confirmatory testing and in failing to make contemporaneous records of their observations. While we are unable to determine on this record the extent to which the technicians would have had discretion to modify these procedures had they in fact described their modifications in writing, it seems clear that they did not have the authority to make modifications without reducing them to writing. Thus, with respect to these allegations of negligence the technicians had no room in which to exercise judgment, and their conduct cannot be shielded from liability by the discretionary function exception.

Even were we to find that the lab technicians had discretion as to the manner in which they tested the grapes, it is apparent that it was not the sort of discretion Congress meant to protect. In *Berkovitz*, which concerned, *inter alia*, a claim that the Division of Biologic Standards

(DBS) of the National Institutes of Health had wrongfully licensed the production of a polio vaccine, the Court made the following observation:

> If petitioners' claim is that the DBS made a determination that [the vaccine] complied with regulatory standards, but that the determination was incorrect, ... the question turns on whether the manner and method of determining compliance with the safety standards at issue involve agency judgment of the kind protected by the discretionary function exception. Petitioners contend that the determination involves the application of objective scientific standards, ... whereas the Government asserts that the determination incorporates considerable "policy judgment" .... In making these assertions, the parties have framed the issue appropriately; application of the discretionary function exception to the claim that the determination of compliance was incorrect hinges on whether the agency officials making that determination permissibly exercise policy choice.

Id. at 544-45, 108 S.Ct. at 1963 (footnote omitted). As this passage makes clear, judgment guided purely by scientific or other objective principles does not involve discretion for purposes of the discretionary function exception. *See also Griffin v. United States*, 500 F.2d 1059, 1066 (3d Cir. 1974) ("Where the conduct of Government employees in implementing agency regulations requires only performance of scientific evaluation and not the formulation of policy, we do not believe that the conduct is immunized from judicial review as a 'discretionary function.' "); *Ayala v. United States*, 980 F.2d 1342, 1349-50 (10th Cir. 1992) ("We fail to see how the determination in this case can be labeled a policy decision. The choice was governed, as plaintiffs contend, by 'objective principles of electrical engineering.' ").

In this case, the technicians' sole purpose in testing the suspect grapes was to determine whether they were contaminated with cyanide. Appellants claim that the technicians were provided with precise, objective, scientific standards to use in the testing. Any decisions made in the course of testing concerning what portions of the grapes to test or how to conduct the tests should have been made

solely with reference to these principles of science. Social, economic, and political factors—those involved in the kinds of decisions Congress intended to shield from liability—had no place in the decision making process. As such, in adjudicating this case the district court will not be "second-guessing" a policy-based decision. Instead, by measuring the technicians' conduct against the procedures they were to have followed and principles of good laboratory practice, it will be undertaking the sort of inquiry that courts are called on to make all the time.

In sum, the FDA's lab technicians had no appreciable discretion as to the manner in which they tested the suspect grapes. And any discretion that they did have was not of the kind shielded from liability by the discretionary function exception.

C.

Finally, we note that we do not find it significant that the conduct challenged in these cases was both preceded and followed by clearly discretionary decisions—the decisions to test incoming fruit and then, based on the test results, to remove all Chilean fruit from the market. With respect to the decision to test fruit in the first place, we are guided by the body of law "holding that once the government makes a policy decision protected by the discretionary function exception, it must proceed with due care in the implementation of that decision." *Caplan v. United States*, 877 F.2d 1314, 1316 (6th Cir. 1989). This line of cases has grown out of the Supreme Court's decision in *Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), which concerned an action against the Coast Guard for negligent operation of a lighthouse. The Court stated:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further

> obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Id. at 69, 76 S.Ct. at 126-27. In this case, once the FDA exercised its discretion to test incoming Chilean fruit, it incurred the obligation to use due care in doing so.

Nor are we led to a different result by the fact that the challenged conduct in this case was followed by a discretionary decision that was, at the very least, a "but for" cause of the harm to plaintiffs. We are not persuaded by the United States' argument that the possibility of liability in situations such as this will have an undesirable effect on policymakers who find themselves in a position analogous to that of the FDA Commissioner in this case. Because there is an obligation to use due care in operating a lighthouse or testing a grape for cyanide, decisions arising from the execution of that duty must be based upon the proper performance of that duty. The desired result is that the purely technical aspects of any such decision will be properly conducted. If there is a chilling effect, as the Government fears there will be, the chill must be directed to ensure the non-negligent operation of the lighthouse or the non-negligent licensing of the polio vaccine or the non-negligent examination of the grapes. Just as the release of polio vaccine is discretionary but the steps to determine that a particular patch of vaccine is properly licensable are not discretionary, so too the withdrawal of cyanide-contaminated grapes may be discretionary but the proper performance of established tests to detect the contamination are not.

In effect, we see no reason to believe that a finding of liability against the government in this case would have effects of a different nature or to a greater extent than a finding of liability against the Coast Guard in *Indian Towing* or against the DBS in *Berkovitz*. In each of these cases, the next time the relevant official makes a similar policy decision—to build a lighthouse, license a vaccine, remove fruit from the market, and so forth—the possibility of tort liability may factor into the analysis. However, the result

which the FTCA seeks to bring about is not to prevent the discretionary decision from being made but to ensure that the objective tests or procedures which underlie that decision are carefully performed.

IV.

For the foregoing reasons, we will reverse the order of the district court dismissing the complaints in these cases, and remand for further proceedings.

STAPLETON, Circuit Judge, dissenting:

I respectfully dissent.

The decision which caused plaintiffs' injury in these cases was the decision of the Commissioner of the FDA to deny entry to Chilean fruit and to destroy the Chilean fruit that was already in this country. That decision was undeniably a policy one made by an official of the executive branch exercising a discretionary function. Plaintiffs seek to escape the legal consequence of this indisputable fact by looking behind the injury causing decision and finding fault with an aspect of the data on which it may have been based. This approach, which the court today endorses, will have a profound, far reaching, and, I believe, unfortunate impact.

Section 2680(a) limits the FTCA's waiver of sovereign immunity by stipulating that that waiver "shall not apply to . . . [a]ny claim . . . based upon the exercise or performance [of] a discretionary function or duty, . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Because the injury causing act here was the Commissioner's March 13th order, the plaintiffs' claim, under a straightforward reading of the statute, would appear to be one "based . . . upon the exercise [of] a discretionary function" and, therefore, to be barred. While I acknowledge that it is possible to characterize plaintiffs' claims as being "based upon" the conduct of the Philadelphia lab technicians, such a characterization requires a reading of the statute at odds with its purpose and does not accurately describe the realities of the situation before us.

In *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), the Supreme Court made the following observation concerning the congressional intent behind the discretionary function exception:

> [W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. Time and again the legislative history refers to the acts

> of regulatory agencies as examples of those covered by the exception . . . . This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.

467 U.S. at 813-14.

The discretionary function exception is thus designed to protect policy making by the politically accountable branches of government from interference in the form of "second guessing" by the judiciary — second guessing the result of which burdens the public fisc and the prospect of which skews the decision making process of executive and legislative policy makers. As the opinion of the court acknowledges, "the imposition of liability for damages occasioned by governmental policy making would necessarily involve a very substantial, if not prohibitive, social cost not only in terms of the imposed liability itself, but also in terms of the constraining effect of that liability on the decisions of governmental policymakers." *Sea-Land Service, Inc. v. United States*, 919 F.2d 888, 890 (3d Cir. 1990).

In situations like this where the injury complained of is occasioned by a regulatory policy, I perceive no difference in the quality or quantity of interference occasioned by judicial second guessing whether the plaintiff purports to be attacking the data base on which the policy is founded or acknowledges that he or she is challenging the policy itself. Accordingly, I believe it is every bit as important to grant discretionary function protection here as it was to grant it in *Varig*.

Moreover, I believe it unrealistic to distinguish, as my colleagues do, between a policy decision and the data on which it rests. Every policy decision involves an exercise of the policy maker's judgment about the reliability, adequacy and significance of the information available to him or her. Because of time and expense constraints and because

experience teaches that human beings make mistakes in technique, perception, logic, communication and a myriad of other areas, no decision maker can have one hundred percent confidence in the information before him or her at any given point in time. Each decision therefore necessarily reflects a judgment of the decision maker that under all the circumstances it is more desirable to make a decision based on the currently available information than to wait for more complete data or more confirmation of the existing data.

This case demonstrates the point well. In the early morning hours of March 13th, the Commission was supplied with the findings of the Philadelphia and Cincinnati laboratories. Three tests conducted on two of the grapes with surface breaks and discoloration indicated the presence of cyanide. The retesting of the slurry and the testing of the third "reserved" grape, the other grapes, and the packaging, however, did not confirm the presence of cyanide. The Commission was required to evaluate this non-conclusive data, including the significance of the fact that no segment of the first two grapes had been reserved for confirmatory testing. Moreover, the significance of all of this data had to be judged in the overall context of the reports to the U.S. embassy in Chile, the surveillance activity that had already been conducted, the probability that contaminated grapes, if they existed, would be consumed, and the probable consequences of any such consumption.

A critical part of the policy making process was the Commissioner's decision to make a decision on March 13th, rather than to await more surveillance and testing. If he had waited, the plaintiffs might not have suffered the injury of which they complain. Of course, the Commissioner did not wait and, unfortunately, that injury did occur. The point, however, is that this decision about when the data was sufficient to permit responsible decision making was an inherent part of the policy making process and just as susceptible of being skewed by the prospect of judicial second guessing as any other part of that process.

This case does not resemble *Berkovitz*. There, the plaintiff had contracted polio from a dose of polio vaccine. The

decisions alleged to have caused the plaintiff's injury were a decision to license the manufacture of the lot from which the plaintiff's dose of vaccine came and the decision to release that lot for use by the public. The Supreme Court held that the discretionary function exception would not protect those decisions if they were contrary to a previously established policy which left no discretion to the decision makers. Where, for example, the policy previously established by statute and regulation deprived the agency of the authority to license a manufacturer without insisting that it submit specified data to the agency, a decision to license without requiring that submission was not a protected exercise of a discretionary function. Similarly, if previously determined policy established objective scientific criteria for release of a lot and deprived the agency of discretion to release a lot not meeting those standards, damage liability could be imposed for a decision to release a lot not meeting those criteria.

The cases before us are not cases in which the injury causing decision was contrary to a previously established policy which deprived the decision maker of discretion. The policy previously established by Congress and the FDA called for the Commissioner to make a discretionary decision on whether the public health required a quarantine of Chilean fruit. The plaintiffs have pointed to no statute or regulation that the Commissioner's decision violated. The best they can do is point to a laboratory manual that allegedly called for the retention of a portion of the first two perforated, white-ringed grapes. It would border on the ridiculous, however, to suggest that this provision of the manual was intended to deprive the Commissioner of the discretion to make the decision that he made on March 13th based on the information available to him at that time.

Nor are these cases in which the policy making process had been completed and negligence in the execution of that policy followed, causing injury. Where negligent execution of a policy has caused injury to the plaintiff, it is feasible to separate the policy and the alleged negligence and the court can second guess the behavior of the allegedly negligent

party without second guessing the policy itself or its formulation.[1]

In the only case I have been able to find involving a situation at all similar to this one, the United States Court of Appeals for the Fourth Circuit, sitting in banc, concluded that the discretionary function exception barred damage liability. *Patterson v. United States*, 881 F.2d 127 (4th Cir. 1989). I would follow that wise counsel and affirm the order of the district court dismissing the complaints in these cases for want of jurisdiction.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

1. By contrast, in any case in which the policy decision itself is attacked on the basis of data available at the time the decision is made, the causation inquiry will necessarily require scrutiny of the policy maker's decision making process and therefore, in most instances, the decision maker's testimony.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BALMACEDA, et al.	:	CIVIL ACTION
	:	
v.	:	Filed Decemmer 30, 1992
	:	
UNITED STATES OF AMERICA	:	NO. 92-0907

MEMORANDUM AND ORDER

HUTTON, J. December 29, 1992

Presently before the Court is the defendant United States of America's Motion to Dismiss the five consolidated actions brought under the Federal Tort Claims Act.[1] These actions allege that the Food and Drug Administration ("FDA") negligently performed cyanide testing which resulted in the denial of Chilean fruit into the United States. Defendant moves to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

FACTUAL BACKGROUND

According to the complaints, taken as true under Fed. R. Civ. P. 12(b), the events which provoked the Chilean grape scare began on Thursday, March 2 1989.[2] On that day, the United States Embassy in Santiago, Chile, received an anonymous telephone call. The caller reported that Chilean fruit exported to the United States would be injected with cyanide. (Complaint, ¶ 9). All Chilean fruit was detained during the

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1. The following complaints have been consolidated under the lead case of *Balmaceda, et al. v. United States of America*, C.A. No. 92-0907.

(1) *Compania Sud Americana De Vapores v. United States*, C.A. No. 92-1208;

(2) *Carben, Inc. v. United States*, C.A. No. 92-1204;

(3) *New Market Invest Corp. v. United States*, C.A. No. 92-1279; and

(4) *Fisher Bros. Sales, Inc. v. United States*, C.A. No. 92-1818;

2. Due to the similarities of the complaints, the parties have focused their arguments on the factual allegations as pled in the complaint of *Balmaceda, et al. v. United States*, C.A. No. 92-0907.

weekend of March 4th and 5th while federal authorities considered the seriousness of the threat. (Complaint, ¶ 10). The FDA concluded after an investigation that the call was a hoax. (Complaint, ¶ 11).

On March 7, 1989, the U.S. Embassy received another anonymous call. This time the caller stated that unidentified fruit had been injected with cyanide. The Embassy was told that the caller had access to orchards, storage facilities and shipping locations in Chile. (Complaint, ¶ 13). On March 11, 1989, in response to the second call, the FDA's Philadelphia District Office doubled its inspection efforts with respect to fruit imported from Chile. The "Almeria Star" was the first vessel subjected to the increased inspection procedures. (Complaint, ¶ 14). Government inspectors examined fruit in sealed holds and transferred any suspected fruit to the FDA's Philadelphia District Office laboratory for testing.

On March 12, 1989, the FDA reported the discovery of two grapes taken from the "Almeria Star" that appeared to have puncture holes and discoloration. (Complaint, ¶ 16). Further, examination produced one additional grape that had what appeared to be a small incision or slit. Investigators sent the grapes along with the crate from which they came to the Philadelphia laboratory where the FDA tested the two punctured grapes. The performed tests purported to detect the presence of cyanide. (Complaint, ¶ 18).

On March 13, 1989, the FDA denied importation of any Chilean fruit, forced the withdrawal of all Chilean fruit in the distribution process and issued a press release that announced the presence of cyanide in the two Chilean grapes and urged consumers and sellers to destroy Chilean fruit in their possession.

The plaintiffs include United States importers, Chilean exporters and Chilean fruit growers. The complaints allege that the FDA negligently performed the testing for cyanide.

DISCUSSION

The threshold question before the Court is whether there is subject-matter jurisdiction in light of the discretionary

function exception of the Federal Tort Claims Act. 28 U.S.C. § 2680(a). To defeat the exception's application, the plaintiffs argue that the FDA did not have the discretion to remove fruit from commerce under § 381(a) of the Federal Food Drug and Cosmetics Act unless it specifically found each article to be adulterated. 21 U.S.C. § 381(a). Plaintiffs argue that any finding of adulteration by the FDA could not be extended beyond that fruit which is appropriately represented by samples. Thus, plaintiffs contend that the FDA in taking action against unexamined fruit did not act within its discretion. They also contend that the FDA did not have the discretion to act given alleged negligent violations of a procedures manual which provides instructions on testing procedures within the FDA laboratory.

It is axiomatic that the United States may not be sued unless there is an unequivocal waiver of sovereign immunity. *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1014 (1992); *United States v. Dalm*, 494 U.S. 596, 608 (1990). In the absence of such an express waiver, federal courts lack subject-matter jurisdiction to hear a claim for damages against the United States. *City of Garland v. Zurn Industries, Inc.*, 870 F.2d 320, 326 (5th Cir. 1989). Plaintiffs initiate their claims for relief under § 1346(b) of the Federal Tort Claims Act ("FTCA" or "the Act") 28 U.S.C. § 1346(b). The Act provides for a limited waiver of immunity with respect to certain tort claims committed by United States employees.[3] However, as the "exceptions" to the FTCA make clear, Congress' waiver of sovereign immunity under § 1346(b) was never intended to extend to all "tort" claims brought against the United States. *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984); 28

3. § 1346 United States as defendant:

(b) . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

U.S.C. § 2680 (exceptions to FTCA). Any government action satisfying the requirements of any exception to the FTCA as codified in § 2680 still enjoys the protection of the doctrine of sovereign immunity. *General Public Utilities Corp. v. United States,* 745 F.2d 239, 242 (3d Cir. 1984), *cert. denied,* 469 U.S. 1228 (1985).

The exception at issue in the instant cases is § 2680(a), the "discretionary function" exception.[4] This section provides that the United States is not liable for:

> any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). In enacting the FTCA, Congress stated that this "highly important exception" was

> designed to preclude application of the bill to a claim against a regulatory agency. . . . based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved . . . The bill is not intended to authorize a suit for damages to test the validity of, or provide a remedy on account of, such discretionary acts, even though negligently performed and involving an abuse of discretion.

H.R.Rep. No. 1287, 79th Cong., 1st Sess. 5-6 (1945).

In *United States v. Gaubert,* 111 S.Ct. 1267 (1991), the Supreme Court outlined the requisites for a complaint to sur-

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4. Other relevant exceptions under 28 U.S.C § 2680 include:

(c) "Any claim arising in respect of . . . the detention of goods or merchandise by any officer of customs or excise or any other law enforcement officer."

(h) "Any claim arising out of . . . misrepresentation."

vive a motion to dismiss under the discretionary function exception. The Supreme Court stated:

> [f]or a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

111 S.Ct. at 1274-75. When applicable regulations provide federal employees with discretion, it must be presumed that an action taken under the regulation is cloaked within the policies upon which the regulation was established. *Id.* at 1274. "A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy making or planning functions." *Id.* at 1275. If the Court finds that discretionary actions are grounded in the policies of the agency's regulations, the agency is protected by the discretionary function exception.

Under this analysis, negligence is not a consideration. *General Public Utilities Corp. v. United States,* 745 F.2d 239, 243 (3d Cir. 1984), *cert. denied,* 469 U.S. 1228 (1985). Therefore, the Court cannot consider alleged violations of a laboratory procedures manual because this argument simply is the basis of the plaintiffs' claim of negligence. The proper focus under the discretionary function exception is on the discretion provided by the regulations, statutes and policies of the FDA. *Gaubert,* 111 S.Ct. at 1274.

The mission of the FDA is the protection of public health. *United States v. Bacto-Unidisk,* 394 U.S. 784, 798 (1969). The enforcement provisions of the Federal Food, Drug, and Cosmetics Act ("FFDCA"), 21 U.S.C. §§ 301-394, "commit complete discretion to the Secretary to decide how and when they should be exercised." *Heckler v. Chaney,* 470 U.S. 821, 835 (1985). The FFDCA prohibits the "introduction or delivery for introduction into interstate commerce of any food, drug,

device, or cosmetic that is adulterated . . ." 21 U.S.C. § 331(a). The FFDCA classifies food as adulterated when the food "bears or contains any poisonous or deleterious substance which may render it injurious to health . . ." 21 U.S.C. § 342(a)(1). The authority to ensure that imported foods meet the standards set by the Act has been delegated from the Secretary of Health and Human Services to the FDA. 21 C.F.R. § 5.10(a)(1).

The FFDCA permits the Secretary of Health and Human Services to request samples of food which are being imported or offered for import into the United States. 21 U.S.C. § 381. However, it does not require such action. Section 381(a), in pertinent part, provides:

> The Secretary of the Treasury shall deliver to the Secretary of Health and Human Services, upon his request, samples of food, drugs, devices, and cosmetics which are being imported or offered for import into the United States, giving notice thereof to the owner or consignee, who may appear before the Secretary of Health and Human Services and have the right to introduce testimony . . . If it appears from the examination of such samples or otherwise that . . . (3) such article is adulterated, misbranded, or in violation of section 355 of this title, then such article shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such article refused admission unless such article is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional time as may be permitted pursuant to such regulations. Clause (2) of the third sentence of this subsection shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under the Controlled Substances Import and Export Act [21 U.S.C.A. § 951 et seq.].

21 U.S.C. § 381(a). Further, the plain language of § 381 of the FFDCA does not limit the FDA in its determination of adulteration solely by an examination of samples. As § 381 pro-

vides, the FDA may refuse admission of food into the United States "[i]f it appears from the examination of such samples **or otherwise** that . . . such article is adulterated . . ." 21 U.S.C. § 381. (emphasis added). Therefore, the language of the statute clearly affords the FDA with the discretion to act without requesting or relying on the results of the testing of samples.

Under this authorization, FDA had the discretion to act during the Chilean grape crisis. The FDA acted to protect the public from the risk of exposure to poisonous fruit which it learned could be coming from Chile. It had the discretion to test the fruit and determine whether the fruit was adulterated. It also had the discretion to refuse entry into the United States. The actions taken were not violative of any regulatory or statutory provisions. The acts taken were in accordance with the FDA's authority to determine whether or not a specific product should be allowed entrance into the United States. This conduct is grounded in the policy of protecting the public health. The actions were clearly in furtherance of the FDA's statutory mission to protect the American public from adulterated food. All the acts involved judgment and choice and were grounded in policy.

Accordingly, the FDA is protected by the discretionary function exception of 28 U.S.C. § 2680(a). Therefore, the Court lacks subject-matter jurisdiction.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BALMACEDA, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	NO. 92-0907

FINAL JUDGMENT

AND NOW, this 29th day of December, 1992, upon consideration of Defendant United States of America's Motion to Dismiss and the responses thereto, IT IS HEREBY ORDERED that Defendant's Motion is **GRANTED.**

IT IS FURTHER ORDERED that the following Complaints are **DISMISSED WITH PREJUDICE:**

(1) *Compania Sud Americana De Vapores v. United States,* Civil Action No. 92-1208;

(2) *Carben, Inc. v. United States,* Civil Action No. 92-1204;

(3) *New Market Invest Corp. v. United States,* Civil Action No. 92-1279; and

(4) *Fisher Bros. Sales, Inc. v. United States,* Civil Action No. 92-2818;

BY THE COURT:

HERBERT J. HUTTON, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GUZMAN Y DEL REAL, LIMITADA, etc.	:	CIVIL ACTION
v.	:	Filed December 29, 1992
UNITED STATES OF AMERICA	:	No. 92-4057

FINAL JUDGMENT

AND NOW, this 29th day of December, 1992, upon consideration of Defendant United States' Motion to Dismiss, IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss is DENIED.[1]

IT IS FURTHER ORDERED that *Guzman Y Del Real, Limitada, v. The United States of America,* Civil Action No. 92-4057 is DISMISSED WITH PREJUDICE.

BY THE COURT:

HERBERT J. HUTTON, J.

1. For the reasons set forth in this Court's Memorandum and Order dated December 29, 1992 in *Balmaceda, et al. v. United States of America,* Civil Action No. 92-0907 and the consolidated cases therein, and because of the similarities in Plaintiff Guzman Y Del Real Limitada's complaint, this Court lacks subject matter jurisdiction and the action is dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

JULIA SAAVEDRA BALMACEDA
AANDRES MUNOZ TORRES
ABALOS LABBE JUAN PABLO
ABATTE OSORIO HONS.
ABDON M. ALVAREZ
ABRAHAM SABAJ NALLAR
ABRIGO OLIVOS RODEMIL
ACEVEDO DURAN OSVALDO HERNAN
ACOSTA RAMIREZ CARLOS
ACUNA CONTRERAS, VICTORIANO
ACUNA MONTERO, MARCO HERIBETO
ACUNA GONZALEZ JAVIER
ADOLFO RIVEROS MARDONES
ADRIANA RODRIGUEZ LARRAGANA
AGR HENRIQUEZ Y VARELA
AGR KIWI MASTERS LTDA
AGRIC MORANDE LAVIN LTDA
AGRIC CAIQUENES LTDA
AGRIC CARVALLO LTDA
AGRIC CERRILLO LTDA
AGRIC CHOROMBO LTDA
AGRIC COTIELLA LTDA
AGRIC DEL ALTO LTDA
AGRIC DEL VALLE LTDA
AGRIC EL ESPINO N.12
AGRIC EL LABERINTO LTDA
AGRIC EL LAUREL DE PAINE
AGRIC EL MAITEN GIGANTE LTDA
AGRIC EL NOGALILLO S.A.
AGRIC EL PELLIN LTDA
AGRIC EL QUILLAY LTDA
AGRIC EL SAUCE LTDA
AGRIC EL TRANSITO LTDA
AGRIC EL TRANSITO UNO LTDA
AGRIC ESTEROS DEL MAIPO
AGRIC FUNDO LA FORTUNA
AGRIC JOSE SOLE Y CIA. LTDA
AGRIC JULIA LTDA
AGRIC LA CHIMBA LTDA
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AGRIC MICHIMALONGO LTDA
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AGRIC MONTERILLA LTDA
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AGRIC PICHIMAPU LTDA
AGRIC PUCON LTDA
AGRIC PUERTA DE HIERRO LTDA
AGRIC SAN JOSE DE DUAO LTDA
AGRIC SAN MIGUEL
AGRIC SAN PABLO LTDA
AGRIC SAN PEDRO LTDA
AGRIC SAN RAMON
AGRIC SANTA AMALIA LTDA
AGRIC SANTA MARGARITA LTDA
AGRIC STA MARTA DE ACONCAGUA
AGRIC STA. ANA DEL SAUCE LTDA
AGRIC URQUIZA E HIJOS LTDA
AGRIC VALLE ALEGRE LTDA
AGRIC Y AVIC. EL PRINCIPAL LTD
AGRIC Y FRUTICOLA GRANADA LTD
AGRICOLA SAT.
AGRIC CASAS DE LA CAPILLA LTDA
AGRIC COMMERC. ASTUDILLO HNOS.
AGRIC E INMOB. PUERTA DEL INCA
AGRIC EL DURAZNO LTDA
AGRIC EL MANDARINO
AGRIC ERRAZURIZ MONTT LTDA
AGRIC FRUT. BARRASO ALVAREZ LTD
AGRIC FRUTOS DE PUNITAQUI LTDA
AGRIC HUERTOS VILUCO LTDA
AGRIC INMOB. EL BOLDAL LTDA
AGRIC LA MASIA LTDA
AGRIC LOS ARROYOS LTDA
AGRIC MANUEL STA. MARIA Y CIA. L
AGRIC SAN GREGORIO LTDA
AGRIC STA B. DE LLANO BCO. LTDA
AGRIC STA. ANA DE CODEGUA LTDA
AGRIC STA. FILOMENA DE HUELQUEN
AGRIC STA. ISABEL DE CODEGUA LT

AGRIC STA. MARTA DE LOS LIRIOS
AGRIC Y. COMERC. LOS PINOS LTDA
AGRIC Y FOREST. EL ALGARROBO LT
AGRIC Y FRUTIC. STA. GABRIELA L
AGRICOLA CHILGRAPES LTDA
AGRIC Y TRANSP. LINARES LTDA
AGRICOLA AGUAS CLARAS LTDA
AGRICOLA ALFONSO SUAREZ Y CIA
AGRICOLA ALSACIA LTDA
AGRICOLA AMALIA DE PAINE LTDA (1)
AGRICOLA AMALIA DE PAINE LTDA (2)
AGRICOLA AMANECER LTDA
AGRICOLA AMAR LTDA
AGRICOLA ANA MARIA LTDA
AGRICOLA ARCAHUE
AGRICOLA BANDURRIAS LTDA
AGRICOLA BATUCO LTDA
AGRICOLA CANTALEJOS LTDA
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AGRICOLA CASAS VIEJAS LTDA
AGRICOLA CAZAUX Y CIA LTDA
AGRICOLA CERRO ALTO LTDA
AGRICOLA COLOMER
AGRICOLA CURACAVI LTDA
AGRICOLA DIAZ
AGRICOLA DOGO LTDA
AGRICOLA DON DIEGO LTDA
AGRICOLA DON RODRIGO
AGRICOLA EL CAMPANARIO LTDA
AGRICOLA EL CARMEN
AGRICOLA EL CRUCERO LTDA
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AGRICOLA EL MAITENAL LTDA
AGRICOLA EL MANZANO LTDA
AGRICOLA EL PATAGUAL LTDA
AGRICOLA EL PEQUEN
AGRICOLA EL SAUCE LTDA
AGRICOLA ENTRE RIOS LTDA
AGRICOLA EPIFANIA LTDA
AGRICOLA ERRAZURIZ LYON LTDA
AGRICOLA FORESTAL EL ESCUDO LTD
AGRICOLA GONZALEZ Y MARITANO
AGRICOLA GRANEROS LTDA
AGRICOLA GREENWICH LTDA
AGRICOLA HERAL LTDA

AGRICOLA ISLA MIRAFLORES LTDA
AGRICOLA LA CABANA LTDA
AGRICOLA LA CANELILLA
AGRICOLA LA CAPILLA LTDA (1)
AGRICOLA LA CAPILLA LTDA (2)
AGRICOLA LA ESCUADRA LTDA
AGRICOLA LA INCA LTDA
AGRICOLA LA PATAGUA LTDA
AGRICOLA LA PORTADA LTDA
AGRICOLA LA CADENAS CTA. 1
AGRICOLA LA DELICIAS LTDA
AGRICOLA LAS DOS MERCEDES LTDA
AGRICOLA LAS MORERAS LTDA
AGRICOLA LOS CAIQUENES
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AGRICOLA LOS ROSALES LTDA
AGRICOLA LOS TILOS LTDA
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AGRICOLA PICHINGAL
AGRICOLA PONDEROSA LTDA
AGRICOLA PUCARA
AGRICOLA RIO COLINA LTDA
AGRICOLA RIO LONTUE LTDA CPA.
AGRICOLA ROS HNOS. LTDA
AGRICOLA RUBEN CRUZ PONCE Y CI
AGRICOLA SAN ANDRES LTDA
AGRICOLA SAN ARTURO LTDA
AGRICOLA SAN ESTEBAN LTDA
AGRICOLA SAN FERNANDO LTDA
AGRICOLA SAN GABRIEL LTDA
AGRICOLA SAN JUAN LTDA
AGRICOLA LA ESTAMPA SOC LTDA

AGRICOLA SAN MANUEL LTDA
AGRICOLA SAN MARCOS
AGRICOLA SAN SALVADOR
AGRICOLA SANTA BARBARA LTDA
AGRICOLA SANTA LAURA LTDA
AGRICOLA SANTO DOMINGO
AGRICOLA SOLER CORTINA LTDA
AGRICOLA SONAR LTDA
AGRICOLA STA CRISTINA LTDA
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AGRICOLA STA. GERTRUDIS
AGRICOLA STA. MAGDALENA LTDA
AGRICOLA STA. MONICA LTDA
AGRICOLA STA. BERTA LTDA
AGRICOLA STA. OLGA LTDA
AGRICOLA STA. ROSA LTDA
AGRICOLA SUMAIA S.A.
AGRICOLA SUNNBERRY LTDA
AGRICOLA TENQUELEN LTDA
AGRICOLA TREBULCO S.A.
AGRICOLA TRINIDAD DE CURICO
AGRICOLA VINA VIEJA
AGRICOLA Y FORESTAL CANADA
AGRICOLA Y FRUTERA TUQUI LTDA
AGRICOLA EL ROBLE LTDA
AGRICOSAN CARLOS DE ROMERAL LT
AGRO 7 AMIGOS LTDA
AGRO BOSQUE SAN ISIDRO LTDA
AGRO FORESTAL MIR LTDA
AGRO GEORGEA
AGRO INVERSIONES LTDA
AGRO FRUT. DONA PILAR LTDA
AGROCOM. LOS OLMOS Y CIA LTDA
AGROELITE LTDA
AGROFRUTICOLA LOS TORUNOS LTDA
AGROIN LTDA
AGROIND. MILLAS Y ALAMO LTDA
AGROINDUSTRIA OROLONCO LTDA
AGROINDUSTRIAL LONCOMILLA S.A.
AGROINDUSTRIAL SANTA ISABEL
AGROLIQUID LTDA
AGROMADERERA MUJICA
AGROPAXI LTDA
AGROPINTO LTDA
AGROSOL LTDA
AGROVALLE LTDA

AGUIGUREN FRANKE GUILLERMO
AGUILAR PALONIO, ANOTNIO
AGUILERA URQUIZA PLINIO
AGUSTIN Y GUILLERMO TORO DAVIL
AGUSTIN ZEGERS ARIZTIA
AGUSTINO SANTIBANEZ MUNOZ
AHUMADA PONCE JOSE L.
ALAMOS MONTERO PABLO
ALAMOS MONTERO, VICTOR
ALAMOS VASQUEZ ADOLFO
ALAS DEL NORTE S.A.
ALBERTO BITRAN NACHARI
ALBERTO DIEZ BERDION
ALBERTO ECHENIQUE LYON
ALBERTO ESPINOZA AGUIRRE
ALBERTO GONZALEZ ITURRIAGA
ALBERTO GUZMAN RIESCO
ALBERTO RAGGIO Y LUISA LOPEZ
ALBERTO RAMIREZ GARRIDO
ALBINO PORFIRI MARCOTTI
ALCANTARA VALDERRAMA LUIS
ALDUNCE TORREALBA HECTOR DOMIN
ALDUNCE TORREALBA HUGO
ALDUNCE TORREALBA JAIME
ALDUNCE TORREALBA SERGIO
ALEGRIA ADONES ALBERTO
ALEJANDRINA VALDES VALDES
ALEJANDRO DIAZ DIAZ
ALEJANDRO FERNANDEZ DE LA TORR
ALEJANDRO GARCIA HUIDOBRO G.
ALEJANDRO GARCIA-HUIDOBRO S.
ALEJANDRO GONZALEZ ROZAS
ALEJANDRO HERRERA PEREZ
ALEJANDRO ISBEJ ALI
ALEJANDRO ISBEJ SAHURI
ALEJANDRO LARACH
ALEJANDRO MUZIO Y OTROS
ALEJANDRO RAMOS ROJAS
ALEJANDRO Y JORGE SKOKNIC
ALFONSO AVENDANO
ALFONSO DAVID LEBON
ALFONSO MUJICA VIZCAYA
ALFONSO NOGUEIRA CORREA
ALFONSO SILVA HUBNER
ALFREDO CHIMENTI AGRIC
ALFREDO OSSA CONCHA

ALFREDO ROMMEROL
ALICIA FERRER MORERA
ALICIA YARUR YADA
ALLENDE ALLENDE LAZARO DEL CAM
ALMENARA MARTIN, RICARDO
ALVARDO NANJARI PEDRO ANTONIO
ALVAREZ BASUALDO EDUARDO
ALVAREZ BECERRA JUAN
ALVAREZ MATURANA, HORACIO
ALVAREZ OBAID MANUEL
ALVAREZ VEGA, TEOFILO MARIO
ALVARO CORREA SOTTA
AMADOR RAMOS SANCHEZ
AMAR AMAR, ALEJANDRO
AMAR AMAR, VICTOR
AMERICO GIOIA GOBBI
AMERICO Y BRUNO GIOIA GOBBI Y
ANTONIO SOTO MIRANDA
ANA ETCHEVERAY C.
ANA MARIA LARRAIN CRUZ
ANDRADE VARGAS LUIS ALBERTO
ANDRADE VARGAS SERGIO GABRIEL
ANDRES CASTRUCCIO BRIONES
ANDRES JOANNON RIESCO
ANDRES JORGE PUIG FERRER
ANDRES SANDOVAL PLAZO
ANDRES VALENZUELA
ANDREW ROBIN MACLEAN BOYD
ANGEL EDUARDO ARANCIBIA F.
ANGEL IBACETA JAIME
ANGEL ROJAS MANUEL JESUS
ANGELA GALMEZ LOPEZ
ANGELICA VASQUEZ VASQUEZ
ANGELO BARBIERI BARBIERI
ANIBAL FLORES CARRERA
ANIBAL SIMONETTI COSTA
ANTONIO PEREIRA IRARRAZABAL
ANTONIO SOTO MIRANDA
ANTONIO TAGLE VALDES
ARANCIBIA CONTRERAS FELIPE
ARAVENA FIERRO CASIMIRO
ARAVENA GONZALEZ LEONIDAS HAR.
ARAVENA SALAZAR MARIA ISABEL
ARAYA MORENO JOSE
ARCE CALDERON HERNAN
ARELANO MARTINEZ JUAN MANUEL

ARELLANO FUENZALIDA, HERNAN
ARGELERY SOTO LISETTE
ARIAS IBACETA JOSE
ARIZTIA DE CASTRO RICARDO
ARIZTIA RUIZ HNAS. AG. LTDA C. PA
ARLOS WINKELMANN SIMONETTI
ARMANDO CASELLA BATISTINI
ARMANDO GENERAL C.
ARNALDO CARIOLA LILLO
ARRENDONDO PADILLA JOSE MANUEL
ARRIGORRIAGA AGUIRRE JAIME
ARTURO AVENDANO BESOAIN
ARTURO COBARRUBIAS VERGARA
ARTURO LABBE ORTIZ
ARTURO MUNOZ MONTANO
ASTABURUAGA CORREA SEBASTIAN
ASTABURUAGA GOYCOLEA OSVALDO
ASTABURUAGA OSVALDO Y CORREA G
ASTORGA ACEVEDO JOSE
ASTUDILLO SEPULVEDA JOSE DEL T
ATILIO CASTILLO IBANEZ
ATILIO ESCOBAR ARAYA
AUGER ALLENDES GUILLERMO
AUGUSTO RIVEROS BEJARES
AURELIA GIOIA GOBBI
AURELIO SAN NICOLAS ROSIQUE
AURORA MORA MORENO
AYALA MORALES CARLOS
AYLWUIN MUNOZ RAUL
AZOCAR ALCAYAGA FERNANDO
BAEZ IBACETA JOSE LUIS
BAEZA DOMINGUEZ FRANCISCO JAVI
BAHAMONDE MORENO IVAN
BAKX BRATH GERARDO
BARAHONA SANCHEZ RAFAEL LUIS
BARRENA IRAZABAL BLANCA
BARRIENTOS BRAVO PATRICIA
BARRIENTOS MATURANA MARIO
BARRIGA CAVADA CLAUDIO
BARROS FREIRE FERNANDO
BARROS FREIRE JORGE
BARROS FREIRE MA. TSA. (PALOMAR)
BARROS FREIRE SERGIO PALOMAR
BARROS INFANTE PAULINA
BASCUNAN A. LORENZO ANTONIO
BASIC MARIN MIROSLAV

BASILIO PORFIRI ROMAGNOLI
BASSO MILLER FERNANDO
BASTIAS ZELADA PELAYO
BECERRA FARIAS JUAN
BECERRA LOPEZ JOSE GABRIEL
BEJARES SOTO MARIO EDMUNDO
BELLO OSORIO RODRIGO
BELTRAN ZEPEDA ZEPEDA
BENAVENTE ZANARTU, FERNANDO
BENEDETTO LEIVA RAMON
BENEDICTO AGUADO HOCES
BERARDI PERALTA VICTOR
BERENGUER QUERA JAIME EMILLO
BERENGUER QUERA MIGUEL ANGEL
BERGER DALDOS RONALD Y OTRO
BERNARDITA LARRAIN CRUZ
BERNARDO CONTRERAS ROMO
BERNARDO KOKE
BERNATH DUMMLER ERNESTO
BERRIOS VEGA, CARLOS JORGE
BEY BARAHONA ELENA
BEY GROOTHOSF PEDRO
BEY HOLZ EDWIN
ARANCIBIA JUAN Y CIA. LTDA
ARANCIBIA REYES, MIGUEL
ARANIBAR VEGA GLENA LUZ
BIANCHINNI FROST GABRIEL
BOBADILLA PRADO JUAN
BODEGA Y VINEDOS SANTA EMILIAN
BOFARULL LEROU, NICASIO
BONTEMPI MARRACCINI MARIO
BOSCH BARRUFET JAIME
BOSSELIN OCHSENIUS, CARLOS
BOZZOLO OGNIO, ORLANDO
BOZZOLO SAGLIETO FRANCISCO
BRAVO NUNEZ MANUEL
BRAVO PERUCCA, DANIEL
BRENDA CANTWELL TALLAR
BRICENO FARIAS MANUEL
BRINKMANN PARADA, RICARDO
BRIONES GENERAL DANIEL
BRITO PIZARRO, GUILLERMO
BROWN LYON VERONICA
BRUNO GIOIA GOBBI
BRUNO MARGOZZINI CELLA
BRUNO PAVONE ARBEA

BRUNO PERINETTI ZELAYA
BRUZZONE CASTE, ENRIQUE
BUDNIK BRODSKY BENJAMIN
BURMESTER MORAN ORLANDO
BUSTAMANTE BEZANILLA JULIO
BUSTAMANTE GUTIERREZ FLORA
BUSTAMANTE HERNANDEZ EDUARDO
BUSTAMANTE PICHUARTE JUAN
BUSTAMANTE UBILLA HECTOR FDO.
BUTRON GOMEZ GERARDO
BUTRON GOMEZ JOSE
C.H.G. AGRICOLA LTDA
CABALIN ROJAS HUGO
CABELLERO ESPINOZA JAIME
CABEZAS LEIVA JOSE
CABEZAS LEIVA JUAN
CABRERA CORONA, HUMBERTO
CABRERA DIAZ APOLIMAR
CABRINI GATTO ELVIO
CABRINI ODDI ROMANO
CADENASSO FERROGIARO SERGIO
CAICEO ESCUDERO JORGE
CALDERON LEON EMILINO
CALDERON PARRA HECTOR
CALDERON PARRA ORLANDO
CALDERON PARRA VICTOR
CALVO GONZALEZ, FERNANDO
CALVO Y CIA. LTDA
CAMBIASO MACCHIAVELLO, ANTONIO
CAMILO DEL C. SANTO ARAYA
CAMPOS ECHEVERRIA ROSAMEL
CAMPOS FRANCE BERTA
CAMPOS MUNOZ, JULIO HUMBERTO
CAMPOS ROJAS JUAN
CAMPOSANO COCIO JAVIER
CANADELL Y CIA. LTDA
CANALES PENALOZA RICARDO
COPOMASSI SANHEUZA, ROLANDO
CARCAMO GUERRERO MARIO FCO.
CAREY ALVARADO MARCELA
CARIZ ALARCON MAXIMO
CARLOS A. MENDOZA GODOY
CARLOS ALBORNOZ MORALES
CARLOS ILABACA NUNEZ
CARLOS GATICA CANAS
CARLOS LAZCANO ALFONSO

CARLOS MANZUR SABA
CARLOS MORAGA FERNANDEZ
CARLOS MOTTA BOLLA
CARLOS PAROT DELSAHWET
CARLOS RODRIGUEZ
CARLOS TAGLE SALCEDO
CARLOS VALLEJOS
CARLOS VERDUGO WOODHOUSE
CARLOS ZEPEDA ZEPEDA
CARMEN ALVEAR FUENZALIDA
CARMEN BARTET AUGE
CARMEN DOMINGUEZ COVARRUBIAS
CARMEN EDWARDS CRUCHAGA
CARMEN FIGARI GUERRERO
CARMEN L ALFONSO GONZALEZ
CARMEN LANGLOIS DELANO
CAROCA CASTRO RAUL
CAROLUS BROWN BARROILHET
CARRASCO ARMIJO RAIMUNDO
CARRASCO CARRASCO HUGO MAURICI
CARRASCO MARFULL POMPEYO
CARRENO CACERES, JUSTO
CARTER ASPEE CLAUDIO
CARTER ASPEE GUSTAVO CARLOS
CARTER ASPEE JOSE MIGUEL
CARTER ASPEE MIGUEL EDGARDO
CASALE BOZZOLO, HUGO
CASAS CORDERO URRUTIA WALDO
CASAS FENSKE GERMAN
CASAS-CORDERO ARCE MANUEL FCO.
CASO CRESPO, ABELARDO
CASTANO GONZALEZ MANUEL
CASTANO GONZALEZ, DOMINGO
CASTELLANI MILIOTTI, PAOLO
CASTILLO MAUGARD RAFAEL
CASTRO DAVIES FERNANDO
CASTRO DAVIES JORGE
CASTRO PARRAGUEZ JOSE SANTOS
CASTRO QUINTEROS CARLOS
CASTRO VILLANUEVA PEDRO ENRIQU
CASTRO VILLANUEVA ROLANDO
CAYAZZO Y OTRA GUSTAVO
CECILIA RODRIGUEZ GOMEZ
CELSI Y CIA LTDA JOSE
CENTRAL FRUTICOLA DELALTO S.A.
CESAR CAMPONOVO CAMPONOVO

CESAR ERCILLA ABARZA
CESRA TOPALI BRUCKMOSER
CHACON FIGUEROA OSVALDO
CHACON VALLEJOS, ANTONIO LUIS
CHACRA SANTA XIMENA LTDA.
CHADWICK ERRAZURIZ LEONOR
CHANDIA CABRERA MARIA
CHINCHILLA GIDIA ALVARO
CHIORRINI ALVETI JUAN
CHRISTIAN GERT EICHHOLTZ P.
CIA. AGRIC EL ALAMO DE NAICURA
CIA AGRICOLA TUNCANA LTDA
CIFUENTES S. BERNARDO
CLAUDIO ARANGUIZ ARANGUIZ
CLAUDIO CISTERNAS
CLAUDIO SCHLACK HARNECKER
CLAVERO GALLARDO JUAN
CLUB AEREO LOS ANDES
COLAIANNI PEZZOPANE ANTONIO
COLARTE CASTILLO SIXTO
COLLADO VINES ALFONSO
COLLARTE RIVACOBA JUAN CARLOS
COM. AGRICOLA LA CAPELLANIA
COM. CASAS VIEJAS LO JELVES
COM. SUCESION MARIANO PEPPI
COMER. AGRIC IRIARTE Y LOZANO
COMERCIAL F.O.P. LTDA
COMERCIAL MAIPO S.A.
COMERCIAL MELIPILLA SA.
COMUN MOLTEDO MARGOZZINI
COMUN. AGRIC EL MILAGRO
COMUN. DONOSO CRUZ
COMUN. AGRIC Y FRUT. LA CUSPIDE
COMUN. AGRIC SALAS CRUCHAGA
COMUN. AVELINO OSSES ALBORONOZ Y
COMUNIDAD AGRIC FAR SALDIVAR
COMUNIDAD AGRIC LA PUNTILLA
COMUNIDAD AGRIC SAN PEDRO
COMUNIDAD AGRICOLA SANTA ESTHE
COMUNIDAD ARAYA BRAVO
COMUNIDAD ARRITOLA AGUIRRE
COMUNIDAD GONZALEZ BEY
COMUNIDAD MALEBRAN ROMERO
COMUNIDAD PALMA CARRASCO
COMUNIDAD PEPPI ONETTO
COMUNIDAD PORFIRI ROMAGNOLI

COMUNIDAD SANTA CECILIA
COMUNIDAD TEODORO FDEZ.
COMUNIDAD VALDIVIESO-HURTADO
CONTADOR VARLETA, MANUEL
CONTRERAS ALVAREZ, GUIDO
CONTRERAS BRIONES, HECTOR FERN
CONTRERAS CONTRERAS SALVADOR
CONTRERAS CONTRERAS, HUMBERTO
CONTRERAS LOBOS JUAN
CONTRERAS YANEZ LUIS
COOP. AGRIC CONTROL PISQUERO
COOP. AGRICOLA PISQUERA ELQUI
CORDERO MUNOZ MARIO
CORNEJO GONZALEZ GUILLERMO
CORP. DE DESARROLLO DE LA C S.V
CORTINEZ BASCUAN ALBERTO
CORTINEZ SALAZAR ENRIQUE
CORVALAN MORELLI ESTELA
COSTA CASINI ENZO
COSTA DOMEISSEN HUGO
COSTABAL CLARO, JOSE ARTUROCO
COVARRUBIAS SANCHEZ TERESA
CRAVIOLATTI OLGUIN LUIS
CREMASCHI FURGOTTI PABLO Y OTR
CRISPI RODRIGUEZ ANTONIO
CRUZ CONCHA HUMBERTO
CRUZ CONCHA, CONSTANTINO
CUADRA GAZMURI, HERNAN DOMINGO
CUELLAR ARAYA LAURA
CUELLAR CUELLAR OSVALDO
CUETO KAHN, MARIA VERONICA
CUETO RIVERA, PEDRO R.
CUEVAS ARROYO GLORIA
CUEVAS CUEVAS EDUARDO
CYD AGROFRUTA LTDA
DAGOBERTO FDO. URETA BARRERA
DANIEL GUZMAN TUDELA
DANIEL ROSAS LEON
DANIEL VICZIAN LASZLO
DANIELS KATZ VALENTIN
DANILO ADONES NAVEA
DANTE ORSINI GUIDUGLI
DE BLASIS FEDERICI ERNESTO
DE DIOS ZUAZO LUIS
DE LA FUENTE CARDEMIL RAMON
DE NADAI MONDIN, GIANCARLO

DE VAL FERNANDEZ MARIA
DEL PEDREGAL ALDUNATE ALBERTO
DEL VALLE VASQUEZ ELIANA
DELGADO ROJAS ELISEO ROBERTO
DEMETRIO MENDOZA ROMERA
DERIU BASUALDO ANDRES
DESARROLLO AGRARIO SOC. LTDA
DIAZ ABARCA MARIO MAXIMILIANO
DIAZ BUNSTER JOAQUIN
DIAZ CARVAJAL GUIDO
DIAZ DE VALDES ROSALES VALEN
DIAZ GALLEGOS JUAN ROBERTO
DIAZ GOMEZ ROLANDO
DIAZ OSORIO, ERNESTO ANTONIO
DIAZ REINOSO JUAN
DIAZ VALENZUELA JUAN
DIAZ VEAS GUILLERMO
DIAZ VEGA, EDSON FERNANDO
DISTRIB. DE FRUTAS LONTUE S.A.
DOLORES CACCIUTTOLO PINOCHET
DOMENICO LUIGGI REYES CALORIO
DOMINGO PARADA AGURTO
DOMINGUEZ COVARRUBIAS ALFONSO
DONOSO DONOSO HUGO
DONOSO ECHEGOYEN MARIO
DONOSO ESCOBAR VICTOR
DONOSO LARRAIN MARGARITA
DONOSO MUNOZ RAMON ANTONIO
DONOSO ORTUZAR ALEJANDRO
DORIS ARELLANO FUENZALIDA
DOSAL HNOS Y CIA. LTDA
DUAMEL HUMBERTO YANEZ
DUIBOL POBLETE ANGULO
DUILIO DELGADO ALVAREZ
DULCIC KOVACEVIC ESTEBAN
DUNCAN ULECIA JAMES
EBERILDO AREVALO GOMEZ
ECHEGARAY UNZUETA, FRANCISCO
ECHENIQUE LYON FRANCISCO
ECHEVERRIA ALESSANDRI, JAVIER
ECHEVERRIA DIAZ Y OTRO DELIA A
ECHEVERRIA LIZAMA REXNER
ECHEVERRIA MOREL EMA LUCIA
EDMUNDO BEJARES
EDUARDO ARAYA CATALAN
EDUARDO CAMPOS FRANCE

EDUARDO CORREA SOTTA
EDUARDO FUSTER
EDUARDO HEINSOHN FIGUEROA
EDUARDO SAA ALVEAR
EDUARDO SAA OSORIO
EDUARDO SCHNEIDER ESPINOZA
EDWARDS IRARRAZABAL MARIO
EL MAITEN LTDA
EL SENDERO LTDA
ELIANA DE AMESTI
ELIANA SIMONETTI FEDERICCI
ELIAS CUMSILLE ZAPATA
ELIAS FIGUEROA PINTO
ELIAS MUNOZ LEON
ELISEO ARTIZAGA GUZMAN
ELISEO CHAPARRO VALENCIA
ELIZABETH SAINTARD PERROMAT
ELSA MAFALDA CAMPOS URIBE
ELSA SMITH HONORATO
EMA FUENTES SALGADO
EMBALAJES AGRIC SAN FELIPE LTD
EMILIO LATRACH ISAAC
EMILIO MANZUR MAJLUF
EMPRESA FRUTERA MANANTIALES
EMPRESA FRUTERA TAULEMU LTDA
ENERO RAMOS MARIA
ENGLANDER NATTUTAT FRANK
ENNIO GIOIA TAVERNARO
ENRIQUE COSTA GOYCOLEA
ENZO MALLOL PENJEAN
F. ALFREDO FONCK BALDE
FAISAL ABU-AWAD H.
FAJARDIN MUSRES ALFALLER
FANNY PIZARRO
FARIAS CATALAN FERNANDO
FARIAS PALACIOS EDILIA ROSE
FAUNDEZ ALARCON JOSE ANTONIO
FCO. CONTRERAS BRIONES
FCO. HERNAN REYES LIARD
FCO. JAVIER DIEGUEZ MANFREDINI
FELIPE AVENDANO
FELIPE ESPINOSA URZUA
FELIPE PEREZ GONZALEZ
FELIX GARRIDO CONCHA
FELIX ORTIZ PABLO
FERGADIOTTI GOMEZ ANDRES

FERNANDEZ DE ANDRACA GUSTAVO/HECTOR
FERNANDEZ IBARRA BENITO
FERNANDEZ LEON ARTURO
FERNANDEZ MONTES DE OCA MANOLI
FERNANDEZ VALDES ENRIQUE
FERNANDO ZENTENO Y CIA LTDA
FERNANDO ALLENDE GONZALEZ
FERNANDO CALDERON PONCE
FERNANDO ERRAZURIZ K.
FERNANDO LAZAETA CASTILLO
FERNANDO OSSA VALDES
FERNANDO PALMA MANCILLA
FANO ARRIGORRIAGA FERNANDO
CORTES CHADWICK, PATRICIO
CORREA VILLALOBOS JORGE
CORREA VILLARROEL LUZ EUGENIA
CORREA CORREA JOSE
CORREA CORREA JUAN
CORREA ESPINOZA FCO. JAVIER
CORREA SALAS FRANCISCO
CORREA SOMAVIA JORGE
BUTRON Y OTRO JOSE
CAMILO GONZALEZ
EDUARDO ALEGRIA ADONES
EDUARDO VALENZUELA PALOMO
ERNESTO OLMEDO MUNOZ
CORP. DE DES. SOCIAL DEL SECT. RU
CORP. METODISTA EL VERGEL
CORRAL ASTORGA OMAR Y CIA
CORREA CORREA EDUARDO
DONOSO CRUZ, RODRIGO GUSTAVO
ENRIQUE GONZALEZ CRUCHAGA
ENRIQUE MANZUR MANZUR
ENRIQUE SILVA RISOPATRON
ENRIQUE ZORRILLA CONEMA
ERASMO GUERRA MUNOZ
ERMELINDA ASTUDILLO AGUILERA
ERNESTO BRAVO SOTO
ERNESTO MULLER LOPEZ
ERNESTO SAAVEDRA OPAZO
ERNESTO VALENZUELA SANCHID
ERRAZURIZ ARNOLDF CLEMENTE
ERRAZURIZ EYZAGUIRRE LUIS
ESCALANTE MAZUELA HUMBERTO
ESCALANTE MAZUELA JULIO
ESCOBAR, SERGIO DEL ROSARIO

ESPINOLA V. Y OTROS FERNANDO
ESPINOZA CERON GABRIELA AMERIC
ESPINOZA SCHEURCH MARIO SN. LOR
EUGENIO ABACA SANCHEZ
EUGENIO CARVALLO CALDERON
EUGENIO FERNANDEZ WEBER
EUGENIO MANDIOLA CABALLERIA
EUGENIO MUNITA T RREALBA
EUGENIO MUNOZ LEON
EUGENIO RIVAS PEREZ Y OTROS
EUGENIO TORREJON PEREZ
EUGENIO VALENZUELA SOMARRIVA
EUSEBIO GARCIA K.
EVELIN IRXMAYER
EXEQUIEL GALDAMES M.
FERNANDO RECIO OLGUIN
FERNANDO RIERA RAWLINS
FERNANDO VARGAS JARA
FIDEL GONZALEZ MUNOZ
FIGARI GUERRERO JORGE
FILLIPOWI ROSSI ALEJANDRO
FISCHER GAYSINSKY JULIO
FLOR SAPAJ ZUROB
FLORENCIO JORQUERA GONZALEZ
FLORES GALMEZ, JORGE FERNANDO
FONES INFANTE DONALD
FONTECILLA GALLARDO CECILIA
FRANCISCO CABRERA AVENDANO
FRANCISCO CERESUELA PONS
FRANCISCO COLOMER
FRANCISCO CONTRERAS BUSTOS
FRANCISCO FANO ARRIGORRIAGA
FRANCISCO IRARRAZABAL VALDES
FRANCISCO RIOS CORTES
FRANCISCO STA. MARIA BALMACEDA
FRANCISCO TOSO ASTE
FRANCISCO VIDAL PASTRIAL
FREIRE WALKER ELISA (PALOMAR)
FRENANDO LOBO MALFANTI
FRESNO MUJICA, JAIME
FRIAS CASTILLO, FERNANDO P.
FRIAS DONOSO HUGO
FRINDT MARAMBIO GUILLERMO
CAMILO MUNOZ VERA
EXPLOTADORA AGRICOLA AGREX LT
EXPORTADORA GREIFRUT Y CIA LTD

EXPORTADORA RIO BLANCO LTDA
EXPORTADORA RUCARAY LTDA
FRUNAC MAIPO
FRUPAC LTDA
FRUT. LA CHIPANA Y CIA LTDA
FRUT. Y FOR. STA. VICTORIA LTDA
FRUT. EL PARRONAL TREINTA LTDA
FRUT. GALVEZ CARVALLO Y CIA. LTD
FRUT. JACK DABIKE Y CIA. LTDA
FRUT. JOSE SOLER Y CIA. LTDA
FRUTA S.A
FRUTERA LINDEROS
FRUTEX LTDA
FRUTICOLA GRANADA LTDA
FRUTICOLA LOS CRISTALES
FRUTICOLA NOGALES LTDA
FRUTICOLA STA. JULIA LTDA
FRUTICOLA W.L.K.
FRUTICULA SAN BERNARDO LTDA
FRUTICOLA VICONTO S.A.
FUENTES SALINAS ARNOLDO
FUENZALIDA ARAVENA JOSE
FUENZALIDA CABALIN EDMUNDO
FUENZALIDA FERNANDEZ MIGUEL
FUENZALIDA FUENZALIDA, OSVALDO
FUENZALIDA HERRERA CARLOS
FUENZALIDA MANGAS HHOS. LTDA
FUENZALIDA TOLEDO JORGE
FUENZALIDA TOLEDO VICENTE
FUND. BENEF. EMILIO TRIVELLI F.
FUND. ESC. AGRIC SN. VICENTE DE P
FUNDO AGRO-HERRERA LTDA
FUNDO LA PATAGUILLA -EL BOSQUE
GABRIEL JOANON INFANTE
GABRIELA SALSILLI Y OTRO
GABRIELA VALDES VALDES
GACITUA CEA ROLANDO
GAETE CARO JOAQUIN
GAGLIANO Y CIA. LTDA
GAJARDO GONZALEZ LUIS ALBERTO
GAJARDO MORALES, SERGIO
GALACFRUT
GALAZ QUEZADA, JUAN FRANCISCO
GALLARDO ZELAYA, JOSE BERNARDO
GALLEGUILLOS JUAREZ CARLOS
GALVEZ GALVEZ ISAMEL

GAMBOA MORAN MANUEL
GANADERA PETEROA LTDA
GANDOLFI DE LA FUENTE EDITH
GARATE REYES, HECTOR
GARCHITORENA VERGARA JOSE M.
GARCIA ALAMOS, JAIME
GARCIA NIETO CLAUDIO
GARCIA RUBILAR, LUIS GONZALO
GARCIA VERA GALVARINO
GARCIA VIDAL, AGAPITO
GASTON ORCHARD PINTO
GAZMURI MARTIN EDUARDO
GENOVA SOC AGRIC LTDA
GERARDO ACEITUNO JIMENEZ
GERARDO ORTUZAR SILVA
GERMAN AHUMADA
GERMAN CLARO LIRA
GERMAN ERRAZURIZ ARNOLDS
GERMAN MONTES RENCORET
GERMAN MONTES Y OTROS
GERT EICHHOLTZ LUCH
GIDIA GATTO ARMANDO
GIDIA TAVERNARO HERIMNIO
GIGLIO MAIRA ATILIO
GIGLIO RAGGI TERESA
GILBERTO BASCUNAN RAMIREZ
GIOIA GASPARONI HECTOR
GIRARDI BONATE CARLOS
GLORIA ANICH ESPOZ
GODOY MATTE DOMINGO
GOMEZ CARIZ ROSALINDO
GOMEZ CARRENO PEDRO JUAN
GOMEZ FARIAS OCTAVIO
GOMEZ SALINAS VICTOR
GOMILA FARFAN, MIGUEL A.
GONZALEZ ALLENDE BENEDICTO
GONZALEZ AYALA LEONIDAS
GONZALEZ BRAVO JUAN
GONZALEZ CUBILLOS EDUARDO
GONZALEZ DIAZ JULIO
GONZALES ESCOBAR MARIA
GONZALEZ GONZALEZ LUIS ALBERTO
GONZALEZ OROSTICA, CESAR A.,
GONZALEZ ROBOLLEDO JUAN F.
GONZALEZ SANTIBANEZ TEODORO
GONZALEZ VIERA MARCIAL

GONZALEZ ZAMORA ALEJANDRO
GONZALO ARRAU UNZUETA
GONZALO CHINCHILLA GIOIA
GONZALO MALLOL VILLABLANCA
GONZALO PEREZ LLONA Y OTROS
GORIGOITIA LAZCANO HUMBERTO
GORIGOITIA RETAMAL PATRICIO
GOYCOLEA FIGUEROA JOSE MIGUEL
GOYCOLEA MOZO MARIA TERESA
GOYCOLEA Y CIA.
GRACIELA CABRERA CAMPOLLA
GRACIELA URRA HURTADA
GREGORIO CORREA
GREGORIO SEMENEK MARDONES
GUELL GALOFRE DANIEL
GUERRA IBACETA RAUL
GUERRERO ASTABAURUAGA MARIA
GUERRERO LEIVA JOSE ELICERIO
GUERRERO MUNOZ EFRAIN
GUIDO PAVEZ GONZALEZ
GUILLERMO MARTINEZ JARUFE
GUILLERMO OSORIO BRADLEY
GUILLERMO PENA Y LILLO MORA
GUILLERMO PROHENS SOMMELLA
GUILLERMO RIEDEL GRUNWALDT
GUILLERMO TORRES GUZMAN
GUILLERMO ZUNIGA Y OTROS
GULIANO BECCARI, MIGUEL ANGEL
GULIANO CIAFRELLI, ANGEL
GUMERCINDO AMADOR TORO LILLO
GUSTAVO MUNOZ HEREDIA
GUSTAVO PEREZ HETTICH
GUTIERREZ MORALES JORGE
GUTIERREZ MORALES SERGIO
GUZMAN FARIAS CARLOS
GUZMAN RIESCO ELVIRA
HAMILTON HOLDER BEVERLY
HARDT LOPEZ, BERNABE
HARNAN GARCES VIAL
HASBUN NAZAR PATRICIO
HAUVA CUADRA ALFONSO
HAUVA CUADRA WALTER
HAUVA VELASCO VICTORINO RAFAEL
HECTOR ALLENDE A.
HECTOR BUSTOS CORDOVA
HECTOR CORNEJO CORNEJO

HECTOR FUENTES GONZALEZ
HECTOR GIOIA TAVERNARO
HECTOR HMBTO. GUZMAN ALVAREZ
HECTOR OSVALDO CACERES LIZANA
HECTOR PAIROA EPPLE
HECTOR ROBLES CONTADOR
HECTOR SEPULVEDA
HECTOR VILLARROEL V
HELO BARRIS JUAN ENRIQUE
HENRIQUEZ HENRIQUEZ, PEDRO A.
HENRIQUEZ MARICH JUAN
HERIBERTO FIGUEROA G.
HERIBERTO SALAZAR ACEVEDO
HERMINIO GONZALEZ C. Y OTROS
HERNAN GUERRERO GARFIAS
HERNAN PARDO GONZALEZ
HERNAN PARENTINI GIARDO
HERNAN QUIROZ CIA. LTDA
HERNAN RICOTH AHUMADA
HERNAN RODRIGUEZ LARRAGANA
HERNAN RODRIGUEZ ORTUZAR
HERNAN ROSSELOT S. DE Z.
HERNAN VALDES VALDES
HERNAN VALENZUELA ENCINA
HERNAN Y FDO. GOMEZ MONTT S.A.
HERNAN ZUNIGA CARVAJAL
HERNANDEZ VILLALON FRANCISCO
HERNANDEZ VILLALON, RICARDO
HERRERA ARACENA PABLO
HERRERA ARANCIBIA CESAR JOSE
HERRERA FERNANDEZ, ALEJANDRO H
HERRERA FERNANDEZ, JERARDO JUAN
HERRERA FLORES DIEGO
HERRERA GARCIA VICTOR
HERRERA RIVERA DIEGO
HERREROS Y OTROS CARLOS
HERTLEIN WALTER JORGE
CARRENO CHAVEZ HERIBERTO
CORTES ROBLES, MIRTO PASCUAL
HILDA GIOIA GOBBI
HILDA MATURANA IBANEZ
HIRIBARREN EYHERAMENDY LUIS
HOCES COPPELLI ANTONIO
HOCES D/L GUARDIA FERNANDO
HOCES DE LA GUARDIA HELIODORO
HOJAS ALONSO, INES

HOJAS DEL VALLE HECTOR
HORACIO BARROS SANCHEZ
HOTT DAGORRET, JACQUELINE
HUERTA CONTRERAS, ALFONSO
HUERTO DE SANTA LUCIA LTDA
HUERTO LINARES DE PAREDES
HUERTOS CACHAPOAL LTDA
HUERTOS CARMEN SOCIEDAD AGRICO
HUERTOS DE TREBULCO LTDA
HUERTOS ROMERAL LTDA
HUGO CONTRERAS B.
HUGO GMO. ACEVEDO GONZALEZ
HUGO GONZALEZ BRITO
HUGO PEPPI PORFIRI
HUGO V. GIACONI MOZO
HUMBERTO CONTRERAS ACEVEDO
HUMBERTO ESPINA R.
HUMBERTO GHIVARELLO MIGONE
HUMBERTO RIFO LOPEZ
HUMBERTO SAN MARTIN JARA
HUNNEUS MADGE LUIS ALEJANDRO
HURTADO ALVARADO, CARLOS
IBACETA ESTAY BERNARDO
IBACETA LOBOS DAVID
IBACETA LOBOS JOSE
IBACETA LOBOS JUAN
IGNACIO BENAVENTE ARANGUIZ
IGNACIO ESTEVEZ MARIN
IGNACIO FREIRE LEON
IGNACIO PEREZ
INES CACERES BOLELLI
INES CRUZ VIAL
INES ESCOBAR CASTRO
INMOB. Y COM. IRAZU LTDA
INMOB. AGRIC. TANUME
INMOB. PONTA PORA LTDA
IMMOBILIARIA GENERAL S.A
INST. INVEST. AGROPECUARIAS
INTERNATION. CLINIC AND COSMETI
INV. AGR. E IND. SIEMEL S.A.
INVERSIONES DAYAR SA
INVERSIONES MACHALI LTDA
INVERSIONES SAN DANIELE LTDA
IRARRAZABAL VALDES, ISABEL
IRARRAZAVAL VALDES NICOLAS
IRIGOYEN CACERES RENE

IRIONDO ARRUTI JOSE ANTONIO
IRIONDO BALBINO
ISMAEL MORENO
ISMAEL PEREIRA LYON
ISMAEL VALDES VALDES
ISRAEL ALANIS
ITALO GIOIA TAVERNARO
IZQUIERDO MOREIRA FRANCISCO
J. MIGUEL IBANEZ BARCELO
JAIME COLVIN DE LA VEGA
JAIME DE LA LASTRA BERNALES
JAIME GONZALEZ VALDEBENITO
JAIME NUNEZ JARA
JAIME QUINTANILLA VALENZUELA
JAIME SANDOVAL ZUNIGA
JAIME SOLER M
JAIME SOTOMAYOR SAN ROMAN
JARA LAZCANO MARTA
JARPA VELIZ MARIA ANGELICA
JAVIER GIL SALAYA
JESUS CARESUELA PONS
JILIBERTO A. MORALES CASTILLO
JIMENEZ LORCA ANSELMO
JIMENEZ LORCA HERMINIO
JOAQUIN ARRAZTID ECHECOLANEA
JOFRE MONTERO ANA ELSA
JOFRE ROJAS JULIO HUMBERTO
JOHNSON LLONA HERNAN
JORGE AGUADO LONGUEIRA
JORGE AUMADA LEMUS
JORGE CARMONA QUINONES
JORGE CASTILLO ORTUZAR
JORGE CLAVERIA CERDA
JORGE DURAN RAMOS
JORGE FRANETOVIC PISTELLI
JORGE GUSTAVO MEZA VILLALOBOS
JORGE HERNANDEZ AGUIRRE
JORGE OVALLE CRUZ
JORGE P. MERINO DE LA CERDA
JORGE PALAVICINO MUNOZ
JORGE PEREZ SAZIE
JORGE PRADO ARANGUIZ
JORGE TORRES ROJAS
JOSE A LEYTON TORO
JOSE ABARCA
JOSE CANEPA Y CIA. LTDA

JOSE CATALDO BEASAIN
JOSE CONTRERAS CHACON
JOSE CRUZ VERGARA
JOSE DAVID ALVAREZ BASUALTO
JOSE FCO. COLLANTES CALDERA
JOSE FERNANDEZ MARTINEZ
JOSE FRANCISCO BISQUERT URRUTI
JOSE GONZALEZ CALDERON
JOSE GREGORIO DE LA FUENTE
JOSE GUERRA ORTEGA
JOSE LUIS ELORRIAGA Y CIA. LTDA
JOSE LUIS GIL
JOSE LUIS MOURE OPORTOT
JOSE LYON KERVIN
JOSE NAVARRO CORDERO
JOSE OLMEDO BALLESTERO
JOSE R. GONZALEZ CATALAN
JOSE RAIMUNDO LOPEZ ARIAS
JOSE RENE LAGOS TORRES
JOSE SEPULVEDA COFRE
JOSE SERAFIN CADIZ URIBE
JOSE SOTO AVILA
JOSE VERGARA VERGARA
JOSE YANEZ OSORIO
JOVIAL MARDONEZ P.
JUAN ANGEL URCOLA CICHERI
JUAN ARANCIBIA
JUAN ASTORGA ALTAMIRANO
JUAN BAUT. LAGOS TORRES
JUAN C. ORTIZ FERRER
JUAN CARLOS FERRER
JUAN D. GONZALEZ TRUJILLO
JUAN FERNANDEZ JIMENEZ
JUAN FRANCISCO UGARTE PAVEZ
JUAN FUENTES FUENTES
JUAN GONZALO REYES ARRIETA
JUAN HORACIO ZAMORA CEURA
JUAN HUMBERTO ZAMORA
JUAN I. LARRAIN BARROS
JUAN JOSE VERCELLINO D.
JUAN LEMUS SALAS
JUAN OEMNINGER MOURGUES
JUAN OLIVARES ESCOBAR
JUAN PABLO CRUZ UNZUETA
JUAN PABLO FIGUEROA
JUAN PABLO MUJICA VISCAYA

JUAN PABLO RUIZ TAGLE SERRANO
JUAN RAUL FIGUEROA
JUAN RODRIGUEZ LLONA
JUAN SEBASTIAN BISQUERT URRUTI
JUAN VEGA ARTHUR
JUAN ZELAYA EMPARANZA
JULIA DAGUER RAMIREZ
JULIA FUSTE V.
JULIA IRARRAZABAL VALDES
JULIO ERNESTO ZENTENO VERGARA
JULIO GUAJARDO LABRA
JULIO MUNOZ CARVAJAL
JULIO ROJAS URTUBIA
JULIO VIDAL PRIETO
JUSTO LODTMANN VON BHOLEN
KAPLAN KATZ BENJAMIN
KAST SCHINDELE, MIGUEL
KILINGER BRAUNDSDORF HANS
KRAUSS THIER PEDRO
KUNZE WAGEMANN WALTER
LABBE LEON CARLOS
LABBE LEON RAFAEL
LAFERTE CORTES, ARNOLDO
LAHSEN CHAER, CARLOS
LAMPASONA Y OTRO ANGEL Y JAIME
LANDETA ASTICA, RICARDO
LAPOSTOL SILVA LTDA PEDTO Y FC
LARIOS MENGOTTI BLANCA
LARRAIN BASCUNAN VICENTE
LARRAIN COSTABAL LADISLAO
LARRAIN EGUIGUREN RAMON
LARRAIN ERRAZURIZ REGINA
LARRAIN FERNANDEZ, PEDRO PABLO
LARRAIN RUIZ-TAGLE MARIO
LARROULET VIGNAU JUAN PEDRO
LATUF SANFUENTES JOSE MIGUEL
LAZCANO JOSE
LE BLANC KATALINIC GASTON
LECAROS VERGARA JORGE Y CIA.
LECERO PENA MARIA
LEIVA GALAZ JUAN
LEIVA LEIVA JUAN
LEIVA MARIO DEL TRANSITO
LEIVA PUELLES RENATO
LEIVA SEPULVEDA, ISMAEL EDUARDO
LEIVA TAPIA, GUILLERMO A.

LEON GALDAMEZ, VICTOR
LEON NOGUERA SOFIA
LEONARDO LEPE FERNANDEZ
LEONARDO Y LUIS MARCHANT
LEONIDAS VIAL ECHEVERRIA
LEOPOLDO E. AHUMADA FELIU
LEPE ARAVENA ALAMIRO
LEPE MORAN MELCHOR
LEYTON AREVALO JULIO
LEYTON PAVEZ ADRIANA MARTA
LICEO AGRIC A-
LICEO AGRICOLA "A" N# MOLINA
LIDIA MORALES CONTRERAS
LIONEL MUNOZ LEON
LIRA VALENCIA CARLOS
LIVA PALZA LUIS HARVEY
LIZANA LIZANA, ANGEL SERAFIN
LIZANDRO ESPINOZA
LLULL CELCI JOSE
LOBO ESPINOLA, MILTON
LOBOS CANCINO MIGUEL
LOLAS NAZRALA CARLOS
LOLAS NAZRALA MARTA
LONGUEIRA CASTRO JOSE LUIS
LOPEZ ANDINO, SERGIO FERNANDO
LOPEZ DEL PINO VICTOR
LOPEZ HELLFMAN JAVIER
LOPEZ PIZARRO, OLIVIA
LOPEZ VEGA, VICTORIA A.
LOYOLA SILVA MANUEL ANTONIO
LOZANO ENCALADA GABRIEL
LOZANO MANZANARES LUCIANO
LOZANO MOLINERO EMILIO
LORENZO BAUZA ALVAREZ
LUCIANO ARELLANO LOBOS
LUIS A. DURAN ORELLANA
LUIS A. MINCHEL BALLADARES
LUIS A. MOULIAT GARCES
LUIS ALEJANDRO FUENZALIDA C.
LUIS ALESSANDRINI GREZ
LUIS COLOMER
LUIS CORDERO GALDAMEZ
LUIS DIAZ CALDERON
LUIS FARIAS RIVERA
LUIS GALARCE GALARCE
LUIS GUZMAN ROZAS

LUIS HAROLDO ROJAS VEGA
LUIS HBTO. CORTES CORTES
LUIS HERNANDEZ MONTECINO
LUIS HUMBERTO LEPE MONTENEGRO
LUIS LALANE MOLINAS
LUIS MARAMBIO SANCHEZ
LUIS MORALES TAPIA
LUIS O. REYES ARAYA
LUIS PATRICIO ASCUI MONREAL
LUIS PEPPI PORFIRIO
LUIS PEREZ
LUIS POSTIUS AEDO
LUIS REYES VICENCIO
LUIS SAAVEDRA VILLARROEL
LUIS SANTANDER CEPEDES
LUIS VASQUEZ CONTRERA
LUISA GIOIA GOBBI
LUKSIC NIETO BORIS
MAC NELLIS PATTERSON THOMAS
MADERAS PEREZ LTDA
MAGALY ELICES VALDES
MAGDE FERRERS CARLOS
MAIDA MARVISI ENZO MARIO
MALDINI SANCHEZ, JOSE
MALDONADO RAMIREZ JOSE GERARDO
MALDONADO SILVA JOSE RAMON
MALTE CRASEMANN
MANCILLA MELENDEZ, MARIO A.
MANCILLA REYES JOSE L. Y OTRO
MANCILLA SEGOVIA GUILLERMO
MANCILLA SEGOVIA HOMERO
MANCILLA VALENZUELA JORGE G.
MANLEY RAMIREZ HERBERT
MANSILLA SEGOVIA, AUDILIO
MANUEL ANTONIO LAFERTE
MANUEL ARROYO CASTELLANOS
MANUEL AUGUSTO PENAFIEL O.
MANUEL BERMUDEZ ROZAS
MANUEL CALDERON CALDERON
MANUEL ESCUDERO ARANCIBIA
MANUEL ESCUDERO RODRIGUEZ
MANUEL FRANCISCO LARRAIN
MANUEL GONZALEZ FERREIRA
MANUEL J. ESCUDERO VERDEJO
MANUEL JOSE UNDURRAGA
MANUEL LUCERO GAETE

MANUEL ORTIZ FERRER
MANUEL ORTIZ IRIONDO
MANUEL RAMON ESPINOZA SALSA
MANUEL STA. MARIA E.
MANUEL VIDAURRE VALDES
MANUELA ACHURRA LARRAIN
MANZANARES DE LONGAVI LTDA
MANZUR MANZUR FERNANDO
MANZUR SACA EUGENIO
MARCELA MASSON CATTON
MARCELO GROSS F.
MARCELO PIRAINO VALENZUELA
MARCELO VICENTE CONTRERAS B.
MARCIAL H MENA LOBO
MARCO CURA JUAN
MARCOS CATTANEO O
MARCOS GONZALEZ Y OTROS
MANDONES RAMIREZ SERGIO
MARDONES SUIT MOISES
MARDONEZ MARTINEZ HERNAN
MARGARITA BARRIGA DE TAGLE
MARIA ALDUNATE LYON
MARIA CRISTINA DITTBORN O.
MARIA DEL C. ARIZTIA DE CASTRO
MARIA EUGENIA COEYMANS AVARIA
MARIA GEORGINA TAGLE A.
MARIA I. VALENZUELA DE COSTA
MARIA INES VALENZUELA B.
MARIA LORETO FERNANDEZ LEON
MARIA LUISA ALFONSO PERALTA
MARIA R. CRUZ CROCCO
MARIA V. HERNANDEZ ERAZO
MARIA VERONICA BERMUDEZ
MARIA VICTORIA CUADRA VERGARA
MARIANO BECERRA LABRANA
MARIANO PEPPI Y OTROS
MARIN ARACENA OSCAR
MARIO ARANDA ESCOBAR Y OTRO
MARIO CORREA VALDES
MARIO DEL C. ROBLES MIRANDA
MARIO E. EREIRE Y.
MARIO FANTUZZI ALLIENDE
MARIO G. LOZANO ENCALADA
MARIO GALARCE G. Y OTROS
MARIO LEIVA CARROZA
MARIO RAFAEL PEREZ LAZCANO

MARIO TORREALBA BUSQUERTT
MARIO VENEGAS VERA
MARGARITA DEL CAMPO ERRAZURIZ
MARGARITA SARA CRESPO URETA
MARIO ZAMORANO V.
MARIO ZEPEDA Y CRIST. GAEDELHEN
MARION STONE RENNER
MARTEL CORDOVA LUIS
MARTINEZ AGUIRRE, JUAN
MARTINEZ CID FRANCISCO
MARTINEZ FABRIS MARIO
MARTINEZ MADRID PABLO
MARTINEZ MAZIERES JUAN
MARTINEZ PEREZ, MERCEDES
MARTINEZ VALDEBENITO RENE
MARTINEZ VALDES TOMAS
MARTINEZ Y GUZMAN AGRICOLA LTD.
MARTINO MENDILUCE HERNAN
MARUSHA GLEBOFF SILVIA
MASSANES MENESES, ANTONIO
MATHEI AUBELL FERNANDO
MATILDE SALAS VALDES
MATURANA SALAS GERARDO
MATURANA UBILLA VICTOR MANUEL
MAURICIO FARR DURAN
MAURO MEDINA JOSE BENITO
MAX LAVIN BESA
MAYOL BOUCHON LUIS
MAYOL BOUCHON RODOLFO
MEDINA TRONCOSO JUAN
MEDINA ZABALA JORGE
MEJIAS DEVIA JUAN HUMBERTO
MELLA MELLA ANDRES
MENDEL MUNK RENATO
MENDEZ SEPULVEDA JUAN ENRIQUE
MERCANDINO VAMBESE CATALINA
MERCEDES BUSTAMANTE I.
MEZA MAERTENS SERGIO
MIGUEL A. PINO MADRID Y OTRO
MIGUEL DONOSO BARROS
MIGUEL IRIONDO UNANUE
MIGUEL NENADOVICH DEL RIO
MIGUEL SANTELICES PEREZ DE ARC
MIGUEL VIAL RODRIGUEZ
MILTON CONTRERAS
MIQUEL BANADOS CARLOS

MISAEL FERNANDEZ GUAJARDO
MISIONERAS TRANSF. DEL SENOR( )
MISIONERAS TRANSF. DEL SENOR( )
MOLINA APPELGREN MATIAS
MOLINA MOLINA LUIS EDUARDO
MOLINA MOLINA PATRICIO
MOLINA VICENCIO JUAN V
MONARDEZ GALLARDO, TELMO E.
MONASTERIO QUILVO
MONICA HADAD Y OTROS
MONTERO GARCIA CARLOS
MONTERO JARAMILLO RAMON
MONTERO RAMIREZ CESAR
MONTERO SCHMIDT, MARIA TERESA
MONTERO, RICARDO ERNESTO
MONTES BASEDEL AURELIO
MONTES UNDURRAGA TERESITA
MORAGA WEBER MANUEL JOSE
MORALES CONTRERAS RAUL
MORALES FLORES RAMON
MORALES GOMEZ MANUEL
MORALES RETAMAL CARLOS
MORALES RETAMAL GASTON
MORALES SERRANO NIBALDO
MORALES SERRANO PEDRO
MORENO AGUIRRE CARLOS
MORENO ESPINOZA JOAQUIN
MORENO URZUA GERARDO
MOYA RUZ HECTOR
MUGGIOLI OLCERE MARIA C.
MUJICA ALONSO HORACIO
MUJICA SILVA JOSE IGNACIO
MUJICA URZUA CRISPULO OSVALDO
MUSE ANICH ALBERTO
MUZIO MUZIO JUAN
MUNOZ FERNANDEZ ULISES
NARCISO DIAZ C.
NARIO MATUS JUAN EMILIO
NAVARRETE CARVACHO HUGO
NAVARRO SAEZ, JUAN
NAZAL BADER VICTOR
NEIRA FUENTEALBA MARIA
NELSON AVILA CONTRERAS
NIBALDO FUENZALIDA CORREA
NICOLAS KEITL GARCIA
NICOLAS LAPUENTE TEJERO

NICOLAS MORENO URZUA
NICOLAS MORENO VERGARA
NOEL REDARD
NOELLE CORREA MUZARD
NOME HNOS. LTDA
NORA GALLEGUILLOS
NORAMBUENA MARDONES SILVIA ELI
NOVAT OLIVARES CARLOS
NOVOA DIAZ DE VALDES MARIA
NUNEZ DALUISO, ROBERTO
NUNEZ PUGA JORGE IGNACIO
NUNEZ RAMIREZ MARIO
NUNEZ DALUISO FERNANDO
NUNEZ JARA GERMAN
O. NARDINI T. Y R. CABRINI O
OCHAGAVIA LARRAIN CAROLINA
OCTAVIO CALDERA G.
OLAVE VELASCO FERNANDO
OLAVE Y OTRO ELVIO
OLAVE ZANGRONIZ ROGELIO
OLGA CRESPO MONTERO
OLIVARES MARTA
OLIVARES PEREZ SILVIA
OLIVIER GRAMULA DINO
OMAR JOFRE ZAMORANO
ORIANA ABARCA DIAZ
ORLANDO FLORES MUNOZ
ORLANDO SILVA PUELMA
ORLANDO TAPIA VILLARROEL
ORREGO ALBORNOZ LADISLAO
ORREGO ORREGO ALAMIRO
ORSINI MACHIAVELLO RENZO
ORTIZ ORTIZ DIONISIO
ORTIZ ORTIZ GERMAN
ORTIZ ORTIZ RICARDO
ORTIZ PABLO JOSE
ORTIZ PINO EDUARDO
ORTIZ PINO LUIS ALBERTO
ORTIZ Y FERRER LTDA
ORUETA ANSOLEAGA FERNANDO
ORUETA ANSOLEAGA JOSE ANTONIO
ORUETA DE VAL FERNANDO Y OTRO
ORUETA Y CIA. LTDA JOSE ANTONIO
OSCAR ACEVEDO NORAMBUENA
OSCAR GUAJARDO GONZALEZ
OSCAR LEIVA CONTRERAS

OSES GERMANO ANTONIO
OSES GERMANO JAIME
OSORIO SALAS VICTOR
OSORIO VERA FLORIDOR
OSSANDON VALDES, ROBERTO
OSVALDO DEL RIO PEREIRA
OSVALDO GALECIO HERRERA
OSVALDO LUCO ECHEVERRIA
OSVALDO MORANDE ORREGO
OVALLE NORDENFLYCHT JOSE HERNA
PABLO COLLADO COLLADO
PABLO CONTRERAS MARCIAL
PACHECO ALVAREZ DIEGO
PADILLA PADILLA SEGUNDO
PAEZ GALLARDO MANUEL
PALACIOS CARMONA RAMON
PALACIOS RODRIGUEZ LORETO
PALMA VALDOVINOS GASTON
PALMA TORREALBA MARTA
PALMA VALDOVINOS LUZ
PALOMINOS GONZALEZ RAMON SDO
PALOMINOS RIVEROS MANUEL
PARANT EYHERAMENDY JORGE
PARATO BEVILACAVA HERNAN
PARDO GOMEZ, JOSE
PAREDES ZANFORLIN HUGO
PARRAGUEZ GALVEZ LUIS
PARRONALES SANTA ROSA LTDA
PASTEN DIAZ, GUSTAVO ALBERTO
PASTENE URRA RAMON
PATRICIA ARELLANO FUENZALIDA
PATRICIO ASCUI
PATRICIO DONOSO
PATRICIO DUSSAILLANT BENITEZ
PATRICIO FRESNO MUJICA
PATRICIO LOZANO ENCALADA
PATRICIO MARIN TORREALBA
PATRICIO MARTINEZ LOBOS
PATRICIO SOFFIA SOFFIA
PAUL FRESNO, CARLOS
PAVONE VOGLINO JOSE
PEDREROS GAETE, MIGUEL Y OTROS
PEDRO CADIZ OSORIO
PEDRO CORREA BARROS
PEDRO ELIAS RIVERA
PEDRO H SAAVEDRA DE LA FUENTE

PEDRO JOSE ESCOBAR VASQUEZ
PEDRO MALLOL (VILLABLANCA)
PEDRO PABLO CASTILLO CASTILLO
PEDRO PONCE VARGAS
PELAYO CORRERA KRUMENACKER
PELAYO DOMINGUEZ LARRAIN
PELLEGRINI VECCHIOLA ORAZIO
PENA AVALOS LEONTINA
PERALIA PERALIA ALBINO DEL CAR
PEREIRA CORREA LUZ
PEREIRA URIBE JULIO
PEREZ CONTRERAS SERGIO
PEREZ VERA JOSE MANUEL
PEREZ GAETE HECTOR
PEREZ HARVEY FERNANDO
PEREZ JARA SILVIA CLEMENTINA
PEREZ PICASSO RODRIGO
PEREZ ZANARTU JERONIMO
PFENNIGER BOBSIEN LORENZO
PINA PINA AQUILES
PINO AZOCAR MANUEL
PINO JERIA JOSE RENE
PINTO ALVAREZ, ALDO D.
PINTO MALUENDA ALIRO
PIOLA DE ANDRACA, ALFREDO
PIROLA DELL'ORTO CARLOS
PIZARRO BORGONO FCO. ROBERTO
PLASS SCHRDEDER WERNER Y HERIB
PLAZA CASTILLO, LUIS ANTONIO
PLAZA CASTILLO, PEDRO PABLO
POCH FRISMANN, ALBERTO
POLOMINOS GONZALEZ ROLANDO JOS
PONCE BECERRA EUGENIO
PONCE DIAZ MIGUEL
PONCE PICHUN GREGORIO
PRADO BUZETA, GERMAN
PRADO BUZETA, JAIME
PROD-EX AFG LTDA
PROFRUTEX LIMITADA
PROHENS SOMMELLA RAFAEL
PROMOTORA DE INV SEDELCO LTDA
PRUZZO PERCIVALE ATILIO
PUELMA SEPULVEDA VEDA MARTA
QUERA PALACIOS PEDRO PABLO
QUINTANA SILVA SIMEON Y OTROS
QUIROGA MORENO ISIDORO

RAFAEL CACCIUTOLO PINOCHET
RAFAEL GUZMAN SANCHEZ
RAFAEL HERNANDEZ GONZALEZ
RAFAEL MORANDE FERNANDEZ
RAFAEL MORENO URZUA
RAFAEL OSORIO VEGA
RAFAEL RIESCO BERNALES
RAFAEL RIESCO PEREZ
RAFAEL SEGUNDO PAEZ BRANTE
RAFAEL VERGARA TAGLE
RAFAEL ZAMORA ORTIZ
RODRIGO FRIAS DONOSO
RAIMUNDO PORFIRI ROMAGNOLI
RAMBERTO VALENZUELA C.
RAMIREZ ALVARADO OSCAR
RAMIREZ POBLETE LUIS FERNANDO
RAMON A. NOGUERA LECAROS
RAMON ACHURRA LARRAIN
RAMON ANGEL CORTS
RAMON BARRAZA ADAROS
RAMON CASTILLO VALENZUELA
RAMON PINTO IRARAZABAL
RAMON RENCORET MUNOZ
RAQUEL PAIROA EPPLE
RAUL ARELLANO MATURANA
RAUL CASARINO SEGURA
RAUL DIAZ
RAUL LEIVA SAA
RAUL ORTEGA HERNANDEZ
RAUL VALENZUELA SANCHID
RAUL Y RICARDO CASARINO SEGURA
RAVENA LONARDINI FRANCISCA
RAVILET PESCIO RENATO
RAZETO MIGLIARO PEDRO
REINOSO LILLO GUILLERMO
RENATO CONTI GOITIA
RETAMAL ACUNA HUGO
RETAMAL P. LUIS FRANCISCO
REYES CRUZ MANUEL
REYES ERRAZURIZ ALEJANDRO
REYES ESPINOZA FRANCISCO
REYES RIVEROS, MARIA LUISA
RICARDO ARIZTIA RUIZ
RICARDO CASARINO SEGURA
RICARDO F. VALDIVIA C.
RIVADENEIRA Y VERGARA

RIVAS VARAS SERGIO
RIVAS VARELA EUGENIO
RIVERA BEZA, GONZALO
RIVERA VALVERDE, HERNAN ENRIQUE
ROBERT ANGEL LURASCHI GLORIA
ROBERTO PORFIRI TRIVELLI
ROBERTO BINDER DEMARCHI
ROBERTO LEON CONTRERAS
ROBERTO TAMN Y CIA. LTDA
ROBERTO ZULETA MARIN
RODOLFO GARCIA K.
RODOLFO MIRANDA MARIN
RODOSLAV ROJIC LARCO
RODRIGO ALAMOS ANSTED
RODRIGO DIAZ SOFFIA
RODRIGUEZ ARAYA LUIS BELTRAN
RODRIGUEZ GONZALEZ NELLY
RODRIGUEZ PADILLA, BELARMINO
RODRIGUEZ PEREZ EDUARDO
ROJAS DE LA FUENTE
ROJAS GARCIA EDMUNDO
ROJAS LEMUS FRUCTUOSO
ROJAS MUNOZ HUGO
ROJAS RIVERA PABLO ANTONIO Y O
ROJAS ROJAS MARIA ELCIRA
ROJAS SAEZ, JORGE ANIBAL
ROJAS TAPIA, OSCAR
ROMAN CADIZ JORGE
ROMERO CORTES, DOMINGO
RONDA CALVERT GASTON
RONDANELLI V. ROBERTO
ROSA BECERRA CORDOVA
ROSA MARY SOTO
ROSALES FUENZALIDA GLORIA
ROSARIO ERRAZURIZ CONCHA
RUANO SUCH, JUAN ANTONIO
RUBEN L. SILVA CARRASCO
RUBIO AGUILAR FERMAN
RUIZ APIOLAZA JORGE
RUIZ PEREZ, GUILLERMO
RUIZ-TAGLE FERNANDEZ ANDRES
RUIZ-TAGLE FERNANDEZ SERGIO
RUIZ-TAGLE GARCIA-HUIDOBRO CAR
RUPERTO TORO BAYLE
RUZ BAEZA PEDRO SAMUEL
S AGRIC CHANARCILLO LTDA

S AGRIC EL CANELO LTDA
S AGRIC EL GOMERO LTDA
S AGRIC EL PORVENIR LTDA
S AGRIC HOLANDA LTDA
S AGRIC HUALLIPEN LTDA
S AGRIC LA RINCONADA LTDA
S AGRIC LAS TINAJAS LTDA
S AGRIC LOURDES LTDA
S AGRIC MESQUIHUE LTDA
S AGRIC SAUCE GRANDE LTDA
S AGRIC STA MAGDALENA LTDA
S AGRIC TUNICHE LTDA
S AGRIC UNI. AGRI. LTDA
S AGRIC ZELAYA HNOS. LTDA
S FRUT. QUILAPILUN LTDA
S FRUT. SANTA INES LTDA
S AGR S. PABLO DE CAMPUSANO LTD
S AGRIC LISONJERA LTDA
S AGRIC STGO DE CAMARICO LTDA
S AGRIC Y FRUT. EL METAL LTDA
S AGRIC Y FRUT. MALIBU LTDA
S AGRIC AVICOLA STA CARMEN LTD
S AGRIC DONOSO CRUZ Y CIA LTDA
S AGRIC HUERTOS RIO CLARO LTDA
S AGRIC LOS PORTONES DE R LTDA
S AGRIC LOS TRANQUES Y CIA LTD
S AGRIC MONDIN BROTHERS LTDA
S AGRIC SN MIGUEL DE PAINE LTD
S AGRIC UNI. AGRI OVALLE LTDA
S AGRIC Y COM. AZPIAZU Y MANRIQ
S AGRIC Y FOR. C. PEREIRA Y CIA
S AGRIC Y GAN. STA CARMEN LTDA
S FRUT. SAAVEDRA Y WALKER LTDA
S FRUT. Y COM #5 MANANT LTDA
S FRUT. Y FOR. EL PORVENIR LTDA
S INM. COM. Y DE INV. LOS PORTONE
SAA ROZAS LUIS ALBERTO
SAAVEDRA ABARCA GASTON
SABAJ BEIRUT EDUARDO
SABBAGH PISANO CARLOS
SAENZ RIVERA ORLANDO
SAEZ RAULD CARLOS
SALAS CABELLO LUIS ANTONIO
SALAS FDO. Y VIAL CRISTIAN
SALAS RETAMAL ANDRES
SALATIER DEL R. BRICENO C.

SALDIVIA MEDINA HECTOR
SALINAS POBLETE, CARLOS ALFONSO
SALINAS SALINAS LUIS ARMANDO
SALVADOR CATAN
SAMUEL JOFRE ZANFORLIN
SAMUEL SANTA CRUZ FERNANDEZ
SAN MARTIN FUENTES, AGUSTINA
SANCHEZ GUZMAN CARMEN
SANCHEZ LUNA JAIME RODRIGO
SANCHEZ ORTEGA MANUEL
SANDOVAL ESPINA BALDOMERO
SANDRA NARETTO
SANTA CRUZ Y CIA.
SANTA MARIA AGRICOLA LTDA
SANTA SARA DE LONQUEN SA
SANTANDER DE MONACO ANA MARIA
SANTIAGO BOSMAN SPICHIGER
SANTIAGO COVARRUBIAS
SANTIAGO IRARRAZAVAL M.
SANTIAGO PULGAR
SANTIAGO S LEITAO FUENZALIDA
SANTIAGO Y SEBASTIAN CORREA
SANTOS ARRIBAS PALACIOS
SANZONE RIILI, JOSE
SAPAJ BEIRUT JORGE Y EDUARDO
SAPAJ SAPAJ SERGIO
SARA IRARRAZABAL COBARRUBIAS
SARAVIA REINOSO SEGUNDO
SC. AG. S. CATALINA DE MELIPILLA
SCAGLIOTTI BARBANO, PABLO
SCHIMDT MONTES LUIS
SCHMIDT VALDIVIA RAIMUNDO
SCO. AGRIC ANCONA LTDA
SEARLE JOUANNE JORGE
SEEMANN SANTOS CARLOS
SEGOVIA ARANCIBIA, JOSE ATILIO
SEGUNDO GUERRA URTUBIA
SEGUNDO PENA CHACON
SEGUNDO SAAVEDRA
SEGUNDO SERRANO PACHECO
SEGURA CAREY RENATO
SEGURA HUMERES LAURA
SEGURA HUMERES RENATO
SEPULVEDA CAMPOSANO JUAN PABLO
SEPULVEDA OYARCE, OSCAR
SERGIO CACCIUTTOLO PINOCHET

SERGIO CONTARDO FLORES
SERGIO CORREA OSSA
SERGIO COVARRUBIAS ZELAYA
SERGIO HEVIA YANEZ
SERGIO MILLAN LEYTON
SERGIO MUNOZ PIZARRO
SERGIO RAMIREZ URETA
SERGIO REGINATO CIARI
SERGIO RETAMÀL IGLESIAS
SERGIO SCHLACK HARNECKER
SERGIO SIMONETTI CAREY
SERGIO Y DINO REGINATO LTDA
SERANNO LOPEZ DE HEREDIA
SERRANO LOPEZ DE HEREDIA ENRIQ
SERRANO MAC AULIFFE EMILIO
SIEGEL DAUELSBERG ALBERTO
SIERRA ROJAS JOSE MANUEL
SIERRA VASQUEZ ALFREDO
SILVA BARRERA RAUL
SILVA BOUCHON JORGE
SILVA CALDERON, SERGIO I.
SILVA CASTILLO DELIA
SILVA CASTILLO SERGIO
SILVA CIFUENTES MARIO
SILVA CORVALAN FERNANDO
SILVA MUOZ MARIA RUBY
SILVA SANCHEZ LUIS GONZALO
SILVA SILVA, FERNANDO
SILVA VALENZUELA JORGE
SILVA VALENZUELA JULIO LUIS
SILVIA DEL C. ZAMORANO CONTRER
SILVIA DEL CAMPO ERRAZURIZ
SILVIO MOLFINO VALLE
SILVIO ZENTENO VERGARA
SIMONETTI FEDERICI, MIRELLA
SIMONETTI FEDERICI, SERGIO
SIVORI ALZERRECA CARLOS
SMET. FRANK
SOC AG CHISPITA LTDA
SOC AGR CHOQUEN LTDA
SOC AGRIC D V G LTDA
SOC AGRIC CATAGUA LTDA
SOC AGRIC DOBLE O LTDA
SOC AGRIC COM TOLEDO ESPINOZA
SOC AGRIC DON MATIAS
SOC AGRIC EL CARMEN LTDA

SOC AGRIC EL PATAGUAL LTDA
SOC AGRIC EL PERAL LTDA
SOC AGRIC EL TRANQUE LTDA
SOC AGRIC GUAPA LTDA
SOC AGRIC LA COLINA LTDA
SOC AGRIC LA ISLITA LTDA
SOC AGRIC LA VINA LTDA
SOC AGRIC LAS CAMELIAS
SOC AGRIC LAS TRANCAS LTDA
SOC AGRIC LOS GANSOS LTDA
SOC AGRIC LOS MAITENES LTDA
SOC AGRIC LOS NOGALES LTDA
SOC AGRIC MATAQUITO LTDA
SOC AGRIC NUESTRA SRA DE LOURD
SOC AGRIC PINTO Y MONTERO LTDA
SOC AGRIC STA MARIANELLA
SOC AGRIC STA ROSA DE LONTUE
SOC AGRIC Y COM CATO LTDA
SOC AGRIC Y COM EL DESCANSO LT
SOC AGRIC Y COM LOS PERALES LT
SOC AGRIC Y GAN QUILAMAPU SA.
SOC AGRIC Y GAN TORREMOLINOS
SOC AGRIC Y GAND DOS AROMOS LT
SOC AGRIC GONZALEZ LTDA
SOC AGRIC L CARDONAL LTDA
SOC AGRIC ORTIZ Y CIA LTDA
SOC AGRIC STA. INES LTDA
SOC AGRIC SAN JORGE DOS LTDA
SOC AGRIC Y FRUTIC. STA. RITA LT
SOC AGRICOLA EL BOSQUE
SOC AGRICOLA EL DESCANSO
SOC AGRICOLA EL RECREO LTDA
SOC AGRICOLA EL ROBLE LTDA
SOC AGRICOLA FERNANDEZ Y ALAM
SOC AGRICOLA LAS UVAS LTDA
SOC AGRICOLA LOS PRIMOS LTDA
SOC AGRICOLA PANQUEHUE LTDA
SOC AGRICOLA POLPAICO
SOC AGRICOLA SANTA PATRICIA LT
SOC AGRICOLA STA AMELIA
SOC AGRICOLA STA RAQUEL LTDA
SOC AGRICOLA TALCAREHUE LTDA
SOC AGRICOLA UVEX LTDA
SOC AL LUCERO LTDA
SOC FRUTERA COLTAUCO LTDA
SOC FRUTICOLA CALLEJONES LTDA

SOC FRUTICOLA Y EXP FRUTAVID L
SOC AGRIC LA PAZ CHIMBARONGO
SOC AGRIC AGUA VIVA LTDA
SOC AGRIC ALAMEDA LTDA
SOC AGRIC ALFONSO LTDA
SOC AGRIC ANGOSTURA LTDA
SOC AGRIC CAREN LTDA
SOC AGRIC CAREN LTDA
SOC AGRIC COMBARBALA LTDA
SOC AGRIC EL CHEPICAL LTDA
SOC AGRIC EL PAJAL LTDA
SOC AGRIC FINDEL HNOS. LTDA
SOC AGRIC HACIENDA CHADA LTD
SOC AGRIC HORACIO DAGNINO G.
SOC AGRIC LA CAMPANA LTDA
SOC AGRIC LA ENSENADA LTDA
SOC AGRIC LA PARCELA LTDA
SOC AGRIC LAS DELICIAS LTDA
SOC AGRIC LIMANQUE LTDA
SOC AGRIC LOS ROBLES LTDA
SOC AGRIC PANGUECILLO LTDA
SOC AGRIC REQUINGUA LTDA
SOC AGRIC ROBERTO HERNANDEZ
SOC AGRIC SAN FRANCISCO LTDA
SOC AGRIC SAN JAVIER LTDA
SOC AGRIC SAN LUIS DE POLPAI
SOC AGRIC SANTA AMELIA
SOC AGRIC SANTA INES LTDA
SOC AGRIC SEGU OLLE Y CIA.
SOC AGRIC STEFANIA LTDA
SOC AGRIC VAQUERIA LTDA
SOC AGRIC FRUTIC. SN. CRISTOBAL
SOC AGRIC LA ESPERANZA LTDA
SOC AGRIC MUSE ANICH LTDA
SOC AGRIC PUNTO DEL ESTE LTDA
SOC AGRIC SAN JOAQUIN LTDA
SOC AGRICOLA ALIHUEN LTDA
SOC AGRICOLA EL GOMERO LTDA
SOC AGRICOLA EL PANGUI LTDA
SOC AGRICOLA GASPAR GREEN
SOC AGRICOLA LA HORNILLA LTDA
SOC AGRICOLA LA MONTANA
SOC AGRICOLA LOS RANCHOS LTDA
SOC AGRICOLA SAN FDO. LTDA
SOC AGRICOLA SANTA ANA (NORTE)
SOC AGRICOLA SANTA FE LTDA/SEE 2362

SOC AGROFRUTICOLA EL OLIVO LT
SOC AGROFRUTICOLA LOS NICHES
SOC BRAVO Y CIA LTDA
SOC COMMERC. AGRIC. CONFREX LTDA
SOC DELGADO HNOS.
SOC PRIMAVERA AGRIC LTDA
SOC AG C. Y E. ARELLANO LTDA
SOC AG CERRILLOS DE BATUDAHUE
SOC AG COLLIPEUNO TERCERA LTDA
SOC AG EL MANZONAL DE CURICO L
SOC AG EL NARANJAL LTDA
SOC AG EL PERALITO LTDA
SOC AG EL RECURSO LTDA
SOC AG FUNDO LORETO LTDA
SOC AG HTO. NIEVA DE CAMEROS LT
SOC AG HUERTO S. ANTONIO LTDA
SOC AG INMOBILIARIA CHOCOA LTD
SOC AG L/GOLONDRINAS DE STA. AN
SOC AG LOS CARRIZOS
SOC AG S/MARIA APALIA
SOC AG SN. PEDRO DE LA GRANJA
SOC AG STA. MARTA DE MOSTAZAL
SOC AG VINA PEREZ LLANO
SOC AG Y COM. GARCIA Y SOTO LTD
SOC AG Y GAN. MAULE SUR LTDA
SOC AG/COMGUAYACAM LTDA
SOC AG/GAN LOS MOTROS LTDA
SOC AGR LOS LEMUS
SOC AGR ARUCARIA
SOC AGR BELLAVISTA LTDA
SOC AGR BEN DAVID LTDA
SOC AGR CASAS D/OLIVETO
SOC AGR CAVI LTDA
SOC AGR EL BARON LTDA
SOC AGR EL CARMEN DE ABRA
SOC AGR EL HIGUERAL
SOC AGR EL RACIMO LTDA
SOC AGR EL TRANSITO LTDA
SOC AGR FUNDO PONTIGO LTDA
SOC AGR LA CHUPALLA LTDA
SOC AGR LAS PATAGUAS LTDA
SOC AGR LAS PATAGUAS LTDA
SOC AGR MARIA LUISA LTDA
SOC AGR PELVINHUEL LTDA
SOC AGR PICHINCHA LTDA
SOC AGR POLLONI HNOS. YCIA. LTDA

SOC AGR PRAT Y CIA. LTDA
SOC AGR QUILIN LTDA.
SOC AGR RINC. ERMITA LTDA
SOC AGR RIO MAIPO LTDA
SOC AGR RIVACOBA Y CIA LTDA
SOC AGR SAN CLEMENTE LTDA
SOC AGR SAN ISIDRO
SOC AGR SAN MANUEL LTDA
SOC AGR SANTA ALICIA LTDA
SOC AGR SANTA CARLA LTDA
SOC AGR SANTA ELVIRA LTDA
SOC AGR SANTA ELVIRA LTDA
SOC AGR SANTA ROSA LTDA
SOC AGR SAPLUMS LTDA (LA PARVA)
SOC AGR SN. JOSE DE TORO
SOC AGR SN. NICOLAS DE C. LTDA
SOC AGR STA. BERTA LTDA
SOC AGR STA. EUGENIO LTDA
SOC AGR STA LUCIA LTDA
SOC AGR STA TERESA LTDA
SOC AGR TALAMI LTDA
SOC AGR TRAEGER Y CIA. LTDA
SOC AGR TRES ACEQUIAS LTDA
SOC AGR VALLE DORADO
SOC AGR VIDAL-CELSI LTDA
SOC AGR VILLASECA LTDA
SOC AGR Y FRUT. OLIVAR LTDA
SOC AGRI FUNDO EL ESCORIAL LTD
SOC AGRIC LAS PERDICES LTDA
SOC AGRIC CHORRILLOS
SOC AGRIC CORTES CORRAL LTDA
SOC AGRIC CURISOL LTDA
SOC AGRIC LAS DELICIAS LTDA
SOC AGRIC PROFER LTDA
SOC AGRIC SANTA JULIA LTDA
SOC AGRIC SANTA SOFIA
SOC AGRIC ALBORADA LTDA
SOC AGRIC ANCOA LTDA
SOC AGRIC AVILES Y DONOSO
SOC AGRIC CAIQUENES LTDA
SOC AGRIC CASAS LO HERRERA
SOC AGRIC CHEO Y KATARINA LTDA
SOC AGRIC CORDILLERA LTDA
SOC AGRIC CUYANA LTDA
SOC AGRIC DONA ADELFA LTDA
SOC AGRIC DURAZNILLO LTDA

SOC AGRIC ECHEVERRIA HNOS.
SOC AGRIC EDUARDO MACAYA Y CIA
SOC AGRIC EL HUAPI LTDA
SOC AGRIC EL MAITEN DE LA GRAN
SOC AGRIC EL ROSAL DEL ALTO LT
SOC AGRIC FUENZALIDA CALVO
SOC AGRIC HDA. LAS VENTANAS S.A.
SOC AGRIC HTOS. FRUTALES DE PEU
SOC AGRIC HUERTOS STA. ISABEL
SOC AGRIC IGLESIA COLORADA LTD.
SOC AGRIC JAHUEL LTDA
SOC AGRIC KAULEN WESTERMEYER L
SOC AGRIC KLINGENBERG MULLER
SOC AGRIC L Y B. LTDA
SOC AGRIC LAS BANDURRIAS LTDA
SOC AGRIC LAS MERCEDES LTDA
SOC AGRIC LAS URBINAS LTDA
SOC AGRIC LAS VARILLAS
SOC AGRIC LO CAROUNA LTDA
SOC AGRIC LO MOSCOSO LTDA
SOC AGRIC LOS DELFINES LTDA
SOC AGRIC LOS GOMEROS LTDA
SOC AGRIC LOS ROBLES
SOC AGRIC LOS ROSALES DE PTA. C
SOC AGRIC LOS TILOS LTDA
SOC AGRIC MARIBEL LTDA
SOC AGRIC MOSTAZAL LTDA
SOC AGRIC NAICURA LTDA
SOC AGRIC NALTAHUA LTDA
SOC AGRIC NOVICIADO LTDA
SOC AGRIC OSVALDO CORREA Y CIA
SOC AGRIC OVALLE-HORMAN Y CIA
SOC AGRIC PEHUENCHE
SOC AGRIC SAN ANDRES LTDA
SOC AGRIC SAN CRISTOBAL LTDA
SOC AGRIC SAN RAMON LTDA
SOC AGRIC SAN ROBERTO LTDA
SOC AGRIC SANTA ANA LTDA
SOC AGRIC SANTA CATALINA LTDA
SOC AGRIC SANTA GABRIELA LTDA
SOC AGRIC SANTA MARIA LTDA
SOC AGRIC SN. ISIDRO LABRADOR L
SOC AGRIC SN. JOSE DE APALTA LT
SOC AGRIC STA CRISTINA LTDA
SOC AGRIC STA MARGARITA S.A.
SOC AGRIC STA. MARIA DE PUQUILL

SOC AGRIC STA. RITA DEL ALTO S.
SOC AGRIC STA. TERESA DE CULENC
SOC AGRIC UNI. AGRI. COPIAPO LTD
SOC AGRIC UVEX LTDA
SOC AGRIC V. GARRIDO M. Y CIA LT
SOC AGRIC VALLES DEL SUR LTDA
SOC AGRIC VINA LAS PITRAS LTDA
SOC AGRIC Y CON. AMELIO DOSSI
SOC AGRIC Y CON. STA PAULINA
SOC AGRIC Y COMMERC. STA LUISA L
SOC AGRICOLA AGROZENTENO LTDA
SOC AGRICOLA ARAGON LTDA
SOC AGRICOLA BROWN LTDA
SOC AGRICOLA CERRILLOS CAIVAN
SOC AGRICOLA COLONIA LTDA
SOC AGRICOLA EL CARMEN LTDA
SOC AGRICOLA EL TRAPICHE LTDA
SOC AGRICOLA HUILMAY LTDA
SOC AGRICOLA LA PRIMAVERA
SOC AGRICOLA LA RINCONADA
SOC AGRICOLA LINAGRO LTDA
SOC AGRICOLA LOS CANELOS LTDA
SOC AGRICOLA LOS HEROES LTDA
SOC AGRICOLA LOS MAQUIS LTDA
SOC AGRICOLA LOS MORROS LTDA
SOC AGRICOLA NAVIDAD
SOC AGRICOLA OASIS LTDA
SOC AGRICOLA RACO LTDA
SOC AGRICOLA SAN CARLOS
SOC AGRICOLA SAN JORGE LTDA
SOC AGRICOLA SAN JOSE LTDA
SOC AGRICOLA SAN JUAN LTDA
SOC AGRICOLA SANTA ROSITA
SOC AGRICOLA SN. ALBERTO LTDA
SOC AGRICOLA STA. LUCIA LTDA
SOC AGRICOLA Y COM. SAN RAFAEL
SOC AGROFRUTERA STO. DGO. LTDA
SOC AGROGANADERA EL RECURSO LT
SOC AGROIND. DIAGUITAS
SOC AGROIND. L/GUINDOS LTDA
SOC DE EXP. AG. CORTES HNOS. LTDA
SOC DESHIDRATADORA FRUT. SODIFR
SOC FRUT. EL MAITEN DE LOS LIRI
SOC FRUT. S. VICENTE LTDA
SOC FRUT. Y GAN. STA, MARTA LTDA
SOC HTO. STA. ADRIANA

SOC HTOS. DE CHOCALAM LTDA
SOC IND. COM. Y AGRIC. EL TRONCO
SOC IND. COM. Y AGRICOLA S.A.
SOC INVERS. AGRICOLAS LTDA
SOC INVERS. EL PROGRESO LTDA
SOC INVERS. ROSARIO DE CODAO LT
SOC JUAN JORQUERA DIAZ
SOC KUSCH GONZALEZ ANA M. Y OT
SOC LOS HUALPES DE LA VINILLA
SOC LOZANO Y URETA LTDA
SOC MORENO Y CIA LTDA
SOC NUNEZ Y CIA. LTDA
SOC PATRICIO MARIN E HIJOS LTD
SOC RODRIGO GONZALEZ F. Y CIA.
SOC SERV. INTERN. FRUTIC. LTDA
SOC VICTOR Y MANUEL STA. MARIA
SOC VINA MONTT LTDA
SOCIEDAD AGRICOLA ANGEL LAGO L
SOCIEDAD AGRICOLA EL ALAMO LTD
SOCIEDAD AGRICOLA RACO LTDA
SOCIEDAD AGRICOLA SAN CARLOS L
SOCIEDAD AGROCOMERCIAL LTDA
SODIRAME LTDA
SONNEBORN GROSS RICARDO
SOPRAVAL LTDA
SOTELO DOMINGUEZ RAUL
SOTO MUNITA JUAN CARLOS
SOTO REVECO SERGIO
SOTOMAYOR HERRERA RICARDO
SOTOMAYOR SALGADO JUAN CARLOS
SPINIELLO FESTA ELIO
STACCHETTI ENCALADA FULVIO
STANDARD TRADING CO. S.A.
SU GASTON ITURRIAGA GAETE
SUC ARTAHUR ESCOBAR
SUC CARLOS GONZALEZ DONOSO
SUC HERRERA LEIVA
SUC JUAN I. GARAY
SUC LUIS MACAYA
SUC MANUEL RUANO BERMUDEZ
SUC MIGUEL LARROULET R.
SUC PEDRO RIVEROS RONDA
SUC SLEMAN SABAJ SAPAJ
SUC AUGUSTO ALVAREZ BECERRA
SUC DAVID DEL CURTO LIBERA-KAL
SUC DOMINGO GIL VENEGAS M.

SUC GUILLERMO GALLEGOS LEIVA
SUC HERIBERTO FUENTES V.
SUC JUAN MOURA JAIME
SUC JULIO AGUIRRE HAYES
SUC LUIS SILVA GUERRERO
SUC MANUEL J. CORNEJO ABARCA
SUC MANUEL SIERRA ROJAS
SUC REINALDO FLORES MONDACA
SUC SIXTO SANTOS PARADA FUENTE
SUCESION ELVIO OLAVE ZANGRONIZ
SUCESION FCO CROCCO V
SUCESION JOSE ORTIZ GUTIERREZ
SUCESION NICOLAS SCHMIDT
SUCESION PEDRO HALCARTERGARAY
SURIC ALDUNATE IVAN
SURIC ALDUNATE MARIA LUISA
SYLVIA CAMPOS GONZALEZ
T.P.H. COMERCIAL LTDA
TAGLE SCHJOLBERG SONIA
TAMBO FRUT LTDA
TARRES CABALLERO ARMANDO SEGUN
TEILLERY AHUMADA, JOSE
TEODOMIRO GARCIA SOTO
TERESA EDELMIRA GIOIA GOBBI
TERESA GARCIA HUIDOBRO DE V.
TEXIA VIAL CUMMINS
THAL RABOW ALFREDO
THEILER Y CIA. LTDA JAIME RODOL
TOLEDO LEYTON ARTURO
TOMAS GARCIA KOLHER
TORNEL QUIJADA WALDO
TORO ANASTASSIOU MARIA LUZ
TORO BECERRA DOMINGO
TORO ESPINOZA RODRIGO Y JOSE L
TORREALBA BISQUERT JAIME
TORREALBA CUBILLO LUIS
TOSELLI RIVERA CARLOS
TOSELLI SEPULVEDA CARLOS
TOTORAL SOCIEDAD AGRICOLA LTDA
TRIGGS CARRERA DENIS
TRINCADO AMPUERO, MIGUEL ANGEL
TRINIDAD ARIZTIA DE CASTRO
TRUFFELLO CAMPODONICO, RODOLFO
UBILLA CUBILLOS, JUAN DE LA C.
UGARTE MUNOZ VILMA DEL CARMEN
ULLOA MAGNA RENE

UNDURRAAGA BOU Y SAN MARTIN
UNDURRAGA IRARRAZABAL JOSE MAN
UNIMARC INTERNACIONAL S.A.
URCELAY URUETA EDUARDO
URETA CUADRA EDUVIGIS
URETA ESPINEIRA PATRICIO
URETA G'REENE JAIME
URIEL URZUA SEPULVEDA
URQUIZA ABASOLO HERNAN
URRUTIA HACK HORACIO
URZUA URZUA LEONARDO
VALDERRAMA Y CALVO
VALDES COVARRUBIAS JOSE LUIS
VALDES COVARRUBIAS MARIA EUGEN
VALDES COVARRUBIAS MARIA TERES
VALDES SOLAR FERNANDO
VALDES Y ALVAREZ LTDA
VALDIVIA GALVEZ GALVARINO
VALDIVIESO DAVILA RAFAEL
VALENZUELA FERNANDEZ LUIS
VALENZUELA FIERRO PATRICIO
VALENZUELA FIERRO, AGUSTIN
VALENZUELA LOBO JAIME
VALENZUELA ROJAS, ENRIQUE
VALENZUELA SOMARRIVA VIRGINIA
VALENZUELA TORRES FELIX
VALLE BUTRON FRANCISCO
VALLE BUTRON Y CIA. S. AGR. FRANC
VAN SAINTJAN FABRY MAX
VARELA ALFONSO, HECTOR
VARGAS ESPINDULA HECTOR
VARGAS JARA MARIA GABRIELA
VARGAS PORRAS JOSE NORBERTO
VARGAS WEGMANN GONZALO
VARNERO MORENO Y OTRA M. TERESA
VASALLO REYES EDUARDO
VEAS CAMPOS, RENE
VEGA ARTUS JOSE RAMON
VEGA BERRIOS, MIGUEL ANGEL
VEGA MARTINEZ JUAN ADOLFO
VEGA VEGA, BENJAMIN DEL CARMEN
VEGA (GASTON) Y FIGUEROA (STGO)
VELASCO CONCHA FLORENCIO
VELEZ PALACIOS, JUAN SENEL
VELIZ CASTILLO MARIA LUZ
VELIZ PALACIOS, AMADIEL DEL R

VERA CONTRERAS, HECTOR
VERA PALMA MANUEL
VERCELLINO TRONCOSO LEONILDO
VERGARA CARVAJAL CLAUDIO
VERGARA CASAUBON CAMILO H.
VERGARA RAMOS MARCOS
VERGARA SUAREZ FRANCISCO
VERGARA TORO, MARIO
VIAL SALAS, ANDRES ARTURO
VIAL VALDES CLAUDIO
VIAL VALDES TERESA
VIAN SAN PEDRO S.A.
VICENTE CRESPO PISANO
VICENTE IZQUIERDO BESA
VICENTE MUNOZ LEON
VICTOR COPELLO MIRANDA
VICTOR MANZUR SABA
VICTOR OLIVARES
VICTOR OYARZUN KORNER
VICTOR PARRA GUMUCIO
VICTOR STA. MARIA TORREALBA
VICTOR TOBAR GONZALEZ
VICTORIA PALMA VALDEBENITO
VICTORIA QUIROGA MORENO
VICUA GREZ ARTURO
VIDAL ALVAREZ RICARDO
VIDAL GONZALEZ JUAN ROBINSON
VIDAL GORTARI HUGO
VIDAL VIDAL CIRO BALTAZAR
VIDALGO ANTONIO JARA GONZALEZ
VIGNEAUX MUNITA Y CAI. ARTURO
VIHUICO LTDA
VILICHICH MILLA GREGORIO
VILLANUEVA ZBINDEN ANGEL AVELI
VILLARREAL LOPEZ ABRAHAM
VILLARROEL SOMOZA EDUARDO
VILLARROEL URQUIZA SOC AGR LT
VILLASANTE ARANA, JOSE
VINA CONCHA Y TORO S.A.
VINA EL ARRAYAN SOC LTDA
VINA SORRENTO LTDA
VIRGINIA BASUALTO VIDELA
VITECINDO VARGAS CATALDO
VITERBO VEGA MOLINA
VITERO OCHOA
VIVANCO GONZALEZ CARLOS

VON HARPE VON WAHL, ALF
VON MUHLENBROCK LIRA RUBEN D.
WESTERN AGRICOLA LTDA
WESTERN FRUIT S.A.
WIFFENBACH OYARZUN PATRICIA
WILLEN J. GRONDHUIS
WOLFGANG LOHMANN CABROLIERE
WULF PLAGEMANN, GABRIELA
WULF PLAGEMANN, MARTA ELSA
XIMENA TORO VALDERRAMA
YABAR VERGINE HUGO
YANEZ MORAGA, JUAN DE DIOS
YARAD SALVADOR ALEJANDRO
YOLANDA PEPPI PORFIRI
YUNGUE TAULIS MONICA
YURASZEC MARDONES FRANCISCO
ZAGAL NORAMBUENA FERNANDO
ZALDIVAR MACKENNA FERNANDO
ZAMORA QUIROZ RAUL
ZAMORA ZAMORA RAUL
ZANFORLIN JOFRE, MARIA IDA
ZAPATA IGLESIAS LEONARDO
ZAROR ATALA CARLOS
ZDENEX REICHMANN KOVERTOVA
ZEDAN LOLAS PATRICIO
ZENTENO RAMIREZ JOSE TEODORO
ZENTENO RIQUELME RENE
ZENTENO ZELAYA, BENIGNO
ZUGARRAMURDI MORTALENA MARIA
ZUIGA DAZA TITANEO
ZUNIGA KUNSTMANN, LUIS ARTURO
AGOSTINO MATTOLI MARRON
AGRIC STA. LUCIA R.
AGRIC Y FOREST FINIS TERRAE SO
AGRICOLA AGRO-FRIO LTDA
AGRICOLA EL RETIRO LTDA
AGRICOLA SAN PEDRO LTDA
AGRICOLA VALDEMOSA LTDA -
AGRICOLA Y COMMERC. TREBULCO SA
AGRO BUCALEMU S.A.
AGRO COMERCIAL LTDA
AGRO LIQUID LTDA
AGROIND JAIME SOLER
AGROINDUSTRIAL SANTA CRUZ S.A.
ALEJANDRO PEREZ OVALLE
ALFREDO BELLAGAMBA FRUGONE

AMERICO Y BRUNO GIOIA Y CIA LT
ANDINA EXPORTADORA S.A.C.
ANNSER LTDA
ARNALDO BOZZOLO COLOMBO
AUGUSTO E. LIRA COOPER
CARLOS ALBORNOZ
CARLOS ALBORNOZ Y CIA. LTDA
CARLOS DURBECK ZUBER
COMERC. E IND. SERVIFRIO LTDA
COMERCIAL ALFONSO EYZAGUIRRE
COMERCIAL FRUTICOLA S.A.
COMERCIAL LOS CERROS LTDA
COOP. AGRIC Y FRUT. DE CURICO LT
COVARRUBIAS SERGIO ZELAYA
CYD COMERCIO Y DESARROLLO INT
CYD COM. Y DES. INTERNACIONAL SA
DAVID DEL CURTO SA.
DISTRIBUIDORA AGRICOLA S.A.C.
EXP. ALDUNATE LTDA
EXPORT CHILE LTDA
EXPORTE INV. SAN FELIPE S.A.
EXPORTADORA ACONCAGUA LTDA
EXPORTADORA AGRICOLA TOPFRUT S
EXPORTADORA FRUTIC. SAN BDO. LTD
EXPORTADORA POCURO S.A.
EXPORTAL LTDA
FABRICIANO HERRERO D.
FENIX S.A.
FISHER SOUTH AMERICA S.A.
FLORENCIO LAZO Y CIA. LTDA
FRUCENTRO S.A.
FRUTERA SAN FERNANDO LTDA
FRUTEXPORT S.A.
GALAZ QUEZADA ADOLFO
GALDAMES ROSALES MIGUEL AMBROS
HORTIFRUT S.A.
HERNAN RUIZ TAGLE HUMERES
INMOB. E INV. SN. JUAN CAPISTRANO
INST AGRICOLA PASCUAL BARBURIZ
JAIME VARGAS JARA, ESTATE OF
JESUS VILLASANTE BUTRON
JORGE CORREA VILLALOBOS
JORGE J. LUCHSINGER OROPEZA
JORGE MUNOZ RUIS
JOSE A VICENTE K
JUAN A. URCOLA GIOCHERI

LABRA YANEZ HECTOR
LAFRUT EXPORTAC. AGROPEC. LTDA
LAIHACAR HNOS LTDA
LEONARDO ZAPATA IGLESIAS
LUCIANO CAMPOS Y LTDA
LUIS GARCIA CESPED
LUIS SILVA MUNOZ
LUIS TAPIA
MANUEL HERTZ ESCUDERO
MARIA CRISTINA FIGARI GUERRERO
MARTINEZ MUNOZ MIRTA DE LAS M.
MELLA LAGOS ARNOLDO
MOKUM FRUIT COMERICAL LTA
MULTIFRESH SYSTEMS
MUNOS PENA SIMON
MUNOZ ABRAHAM REBECA
MUNOZ BRAVO PEDRO
MUNOZ CORNEJO MANUEL OSCAR
MUNOZ LINEROS RENE OCTAVIO
MUNOZ LOBOS RAMON
MUNOZ MUNOZ ARTURO
MUNOZ MUNOZ ONOFRE ALFREDO
MUNOZ SOLIS MARIA GLADYS
NATTURELLE FOODS LTDA/SEE 2364
ORLANDO TRONCOSO J.J. GIGLIO S.
OTTO ZEMAN SIMON
PALOMINOS GONZALEZ VICTOR JOSE
PEDRO CORTES-MONROY PENAFIEL
PIZARRO MUNOZ JOSE
RENE MUNOZ
RETAMAL BAHAMONDES FRANCISCO
REYES ARAVENA JOSE MIGUEL
RIGOBERTO GOMEZ LAVIN
SERGIO OCHOA ARENA
SIRFRUT LTDA.
SOC AGR RENE URZUA E HIJOS Y CIA. LTDA
SOC AGRIC CURISOL LTDA
SOC AGRIC EL ALAMO LTDA
SOC AGRIC EXP. Y COMERCIAL S.A.
SOC AGRIC FUNDO EL CASTILLO LT
SOC AGRIC LA HIGUERA LTDA
SOC AGRIC LA PRIMAVERA LTDA
SOC AGRIC LA ROSA DE SOFRUCO
SOC AGRIC LAS ARAUCARIAS DE LI
SOC AGRIC LOS ROBLES
SOC AGRIC NACEDAL LTDA

SOC AGRIC SAN GUILLERMO LTDA
SOC AGRIC SAN FRANCISCO LTDA
SOC AGRIC Y COMERCIAL VICTORIA
SOC AGRICOLA LTDA
SOC AGRICOLA LA MONTANA LTDA
SOC AGRICOLA SANTA FE LTDA/SEE 1849
SOC AGRICOLA Y COMERCIAL LTDA
SOC EXP. NATTURALLE FOODS LTDA/SEE 2334
SOC EXP. RUBEN CRUZ PONCE
SOC FRUTIC Y AGRIC LOS LEONES
SOC LAS PERDICES
SOC SAN FCO. LO GARCES LTDA
SOCIEDAD AGRICOLA NOCEDAL LTDA
SOCIEDAD AGRICOLA SANTA ELENA
SOCIEDAD HUERTOS FENIX LTDA
SOFRUQUI
SUC RAUL ORTEGA BEIZA
TAPIA AVILA JUAN
TAPIA GUERRERO SAMUEL VITERBO
TERESA FONTECILLA BASCUNAN
TRANSFRUT S.A.
UNIFRUTTI TRADERS LTDA
UNITED TRADING CO.
VICTOR FAURA CRISTI
VICTORIA TRADING LTDA
COMPANIA SUD AMERICANA VAPORES S.A.
CORREA DONOSO MARCELO
VORWERK Y CIA S.A.
S AGROC FDO. M. DE LA GRANJA L"D
INEDOS ORTIZ S.A.
AGRIC SAN GABRIEL LTDA
AGROINDUSTRIAL PORVENIR
ALFONSO PLAZA PINA
FUENZALIDA DE LA FUENTE ROSALI
FUNDO EL MANZANO
GERMAN MURPHY INES
GONZALEZ CORTES RICARDO
JOSE ORTEGA ARCAUZ
NUNEZ MORENO MARIZ XIMENA
ROLDAN ROLDAN JULIO
S AGRIC LOS MAITENES DE M LTDA
SABBAGH PISANO, MARIA ELENA
SANCHEZ FIGUEROA CARMEN
SARMIENTO SABATER MIGUEL
SOC AGRICOLA MANANTIALES
SOFFRUVIT AGROINDUSTRIAS LTDA

SOC AGRICOLA EL RECREO LTDA (1)
SOC AGRICOLA EL RECREO LTDA (2)
COMERCIAL ASTA ROSA
FEDERICO PUGA CONCHA
GOMEZ MUNOZ TEMISTOCLES
INVERSIONES STA EMA S.A.
JOSE RABAT GORCHS
MARIA DISA JARA ANINAT
RODRIGUEZ PATRICIO
SOC AGRIC ANDIA DE CALERA DE T
SOC AGRIC STA. ANA DEL OLIVETO
SOC AGRIC Y GAN. HDA CHADA LTDA
TERESA GUERRA DE SERRANO
TURRA MELIPIL RENE
YAZIGI BEATRIZ
YAZIGI SOLEDAD
AGRICOLA ALIANZA LTDA.
AGRICOLA SAN JUAN LTDA.
AGRIC E INMOB MONTOLIN S.A.
GONZALEZ ZAMORA JUAN
HECTOR BUSTOS LEON
EXP FRUTICOLA SAN BERNARDO LT
CARBEN, INC.
COMPANIA SUD AMERICANA DE VAPORES S.A.
NEW MARKET INVESTMENT CORPORATION
GUZMAN Y DEL REAL LIMITADA

TERREP EXCLUSIVE

MONTEVIDEO FOR LEGATT

E.O. 12356: DECL: OADR

TAGS: ASEC, PTER, CI

SUBJECT: ANONYMOUS CALL TO CHANCERY

REF: CHARGE GODARD'S JUNE 9TH TELECON WITH AMBASSADOR GILLESPIE

1. (C) ON JUNE 9TH, A CHANCERY OPERATOR RECEIVED AN ANONYMOUS CALL AT THE CHANCERY AT 1158 HOURS. THE OPERATOR HAS STATED THAT THE CALLER IS THE SAME MAN WHO CALLED PREVIOUSLY REGARDING THE POISONED GRAPES.

2. ENGLISH ANGUAGE TRANSCRIPT OF CONVERSATION FOLLOWS.

PHONE CALL RECEIVED ON FRIDAY, JUNE 9, 1989 AT 11:58 HRS. BY

(O OPERATOR; C CALLER)

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PAGE 02 SANTIA 05741 01 OF 04 052121Z

C: I WANT TO TALK TO THE EMBASSY SECRETARY.

O: WE HAVE MANY SECRETARIES, WHICH ONE OF THEM?

C: THE ONE I SPOKE TO ABOUT THE FRUIT. WAS THAT YOU?

O: YES SIR, IT WAS ME?

C: DO YOU REMEMBER I HAVE ALREADY CALLED THREE TIMES, ONE LITTLE CALL TO JAPAN?

O: YES SIR.

C: TO TELL YOU THAT THE GRAPES AND THE FRUIT HAD COME FROM CHILE, POISONED.

O: YES SIR.

C: WAS IT YOU?

O: YES SIR, IT WAS ME.

C: NOW I REPEAT IT AGAIN.

O: TELL ME.

C: THE RESULT IS THAT WE CREATED THIS SITUATION, MMMM,

O: YES.

C: REMEMBER I CALLED THREE TIMES AND WHICH WAS THE MOTIVE, IT WAS BECAUSE OF THE UNIDAD DE FOMENTO, HELP

FOR THE POOR PEOPLE.

O: YES.

C: EVEN IF YOU ARE RECORDING THERE.

O: I AM NOT RECORDING SIR, I AM LISTENING.

C: GO AHEAD AND RECORD, AND THE RESULT IF WE DID NOTHING OURSELVES, YOU UNDERSTAND, NOTHING MORE THAN THE TELEPHONE CALL TO YOU. HERE THERE IS NO POLITICS, NOR MINISTERS, NOR WHAT DO I KNOW, NOTHING, THEN, THIS WAS, EH, WE THOUGHT THAT THE GOVERNMENT WITH THIS WAS GOING TO SEEK SOLVING SOMETHING, ON THE CONTRARY, YOU HELPED THE GOVERNMENT TO HELP THE RICH.

O: NO SIR, IT WAS NOT OUR INTENTION TO HELP THE

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OVERNMENT, IT WAS TO SOLVE A PROBLEM-FOR OUR
OUNTRY, SIR.

: THERE WAS NOTHING, ONLY A LIE THAT THE GRAPES WERE
OING WITH TWO GRAINS WHICH HAD BEEN POISONED, BUT
EMEMBER WELL, THAT I CALLED YOU THREE TIMES.

: YES, BUT WAS IT A LIE THEN?

: A LIE, SEWORITA, THE BIGGEST LIE.

: THAT IS, YOU WANTED TO SCARE THE GOVERNMENT, JUST
N CASE,

: SCARE THE GOVERNMENT JUST IN CASE AND THAT IS WHY
HAVE, WE HAVE LAUGHED AND WHAT DO I KNOW AND I AM
ELLING ALL THE FOOLISH THINGS THEY HAVE DONE.

: OF COURSE, I IMAGINE.

: THAT THEY GO TO THE EMBASSY, THAT JAVIER ERRAZURIZ
ENT TO THE UNITED STATES, THAT THEY SENT THIS, THAT
HEY SPENT A QUANTITY OF MILLION DOLLARS AND THEN THE
UANTITY OF MILLIONS THEY GAVE TO THE FARMERS, AT
EAST THE PEOPLE RECEIVED CLOSE TO 3 MILLION BOXES OF
RAPES SO THEY SAY; WE DID NOT KNOW WHAT, BUT WE HAVE
EOPLE INFILTRATED IN ALL PLACES.

: YES, BUT THEN THE PLAN YOU HAD DID NOT RESULT.

: BUT THE PLAN WE HAVE NOW WILL RESULT.

: WHICH IS THE PLAN YOU HAVE NOW SIR?

: THIS TIME IT GOES, GOES.

O: WHICH IS THE ONE TH GOES?

C: THE ONE THAT GOES, IN THE FIRST PLACE THE AMBASSADOR SAID THE CALL I MADE WAS THAT OF AN IGNORANT PERSON, THE STATEMENT OF YOUR AMBASSADOR,

O: YES

C: AMERICAN

O: YES

C: WE HAVE MORE HEAD THAN HE HAS, WE ARE SMARTER THAN HE IS, AND WE ARE SMARTER THAN THE GENERALS, THE

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TERREP EXCLUSIVE

MONTEVIDEO FOR LEGATT

E.O. 12356: DECL: OADR

TAGS: ASEC, PTER, CI

SUBJECT: ANONYMOUS CALL TO CHANCERY

INTERPOL, AND WHAT WHAT DO I KNOW. NOW IT GOES

STRONGER, VERY STRONG.

O: BUT IN WHAT SENSE, SIR?

C: IN THE SENSE THAT NOW, YOU UNDERSTAND, WE ARE

GOING TO POISON EVEN THE WINE.

O: YOU ARE GOING TO POISIN THE WINE?

C: NOW YES.

O: AH

C: NOW-IT GOES.

O:.BUT SIR, DO YOU BELIEVE THAT THIS IS REALLY GOING

TO SERVE YOUR PURPOSES?

C: AND, AREN'T YOU SELING THAT IF WE HAVE GOT

NOTHING, IF THE TOP ONES HOW THEY ARE ROBBING, AND

YOU ARE LENDING THEM MORE MONEY ON TOP OF IT, AREN'T

YOU SEEING THAT?

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O: NO SIR.

C: HOW THEY ROB, ALL HOW THIS, AND THE DINNERS, AND THEY BRING US FOREIGN ARTISTS, ON THE TELEVISION, WITH NESCAFE, IN THE ..... AND WE THE POOR DO NOT EVEN HAVE FOOD, IN THE "POBLACIONES", OH NO .. DON RANCISCO, MIAMI, RAQUEL ARGANDONA, OH LORD, THIS IS A FEAST. IT SEEMS LIKE A ROMAN CIRCUS.

O: BUT SIR, DON FRANCISCO HAS NOTHING TO DO WITH HE GOVERNMENT.

C: THE GREATEST SCOUNDREL, THE TELETHON, HOW MUCH DID HE STEAL. BOANOVICH, BOANOVIC (VODANOVIC) WHO WAS ONLY RECENTLY IN MIAMI, SCOUNDRELS, BANDITS, WE PREPARED SPECIALLY FOR THEM SOME LITTLE BOMBS ON THE PLANES TO MIAMI.

O: YOU ARE GOING TO PUT BOMBS ON PLANES?

C: ON PLANES.

O: AND ALL OF THOSE WHO HAVE SOMETHING TO DO WITH

SHOW BUSINESS?

C: ALL THOSE WHO HAVE SOMETHING TO DO, INCLUDING YOURSELF OF THE AMBASSADOR.

O: THE AMBASSADOR AND US TOO?

C: EVEN IF YOU SEND THE GENERALS TO CHILE, YOU AREN'T GOING TO CATCH US.

O: BUT SIR, WE HAVE NOTHING TO DO WITH THIS AFFAIR?

C: NOW, YOU HAVE TO DO THE FOLLOWING: INFORM THE PAPERS, THE PRESS THAT THIS WAS PURE EH EH LIGHT FLYERS. NOW IS THE HARD TRUTH.

O: IT IS COMING NOW?

C: ALL THIS WAS DONE EXCLUSIVELY TO SEE WHAT THE REACTION THE GOVERNMENT HAD, ALONG WITH THE RICH. ALLENDE SAID THAT WAS THE GOVERNMENT OF THE POOR AND THIS ONE SAID HIS WAS THE GOVERNMENT OF THE RICH.

O: MMMM

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C: EXACTLY - DON PINOCHET.

O: BUT ARE YOU SURE YOU DON'T REPRESENT ANY POLITICAL GROUP, SIR?

C: NO POLITICAL GROUP, I CAN ASSURE YOU, ALTHOUGH

O: SO IT IS ONLY BECAUSE OF THE UNIDAD DE FOMENTO PROBLEM?

C: THE PROBLEM IS THAT WE HAVE A, ARE INTEGRATED BY ABOUT 50 PERSONS.

O: YES, AND ALL HAVE PROBLEMS?

C: WE ALL HAVE A CAPACITY (ABILITY?), NOT WHAT THE AMBASSADOR SAID THAT WE WERE IGNORANT, HE WITH THE APPEARANCE THE AMBASSADOR HAS, NO? (SOUND OF PUBLIC TELEPHONE WARNING THAT THERE ARE ONLY A FEW SECONDS OF CALL LEFT - A PAUSE AND APPARENTLY INSERTS ANOTHER COIN TO GO ON TALKING).

O: HELLO?

C: ASK ME, THE OTHER AMBASSADOR WHO WAS HERE.

O: NO, BUT YOU ARE ONLY ON THE UNIDAD DE FOMENTO PROBLEM, SIR?

C: AH?

O: WHAT YOU ARE DOING IS ONLY BECAUSE OF THE UNIDAD

DE FOMENTO PROBLEM?

C: NOT ALL THE PROBLEMS, THIS IS GOING TO GO ON UNTIL THE LEFT COMES IN, THE RIGHT GOES OUT

O: AND TELL ME, ARE YOU A GROUP OF UF DEBTORS?

C: NOOOO, WE ARE THE SAVIORS OF THE PEOPLE.

O: ARE YOU THE SAVIORS OF THE PEOPLE?

C: SAVIORS OF THE PEOPLE.

O: YES.

C: LOOK, WE HAVE JUST LIQUIDATED AN AIR FORCE COMMANDER.

O: YOU HAVE JUST KILLED AND AIR FORCE COMMANDER?

C: OF COURSE.

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MONTEVIDEO FOR LEGATT

E.O. 12356: DECL: OADR

TAGS: ASEC, PTER, CI

SUBJECT: ANONYMOUS CALL TO CHANCERY

O: AND WHERE WAS THIS?

C: UP IN THE "BARRIO ALTO" (HIGHHURIZU: A COMMUNIST, BUGGER, PARDON ME.

O: WAS HE A COMMUNIST?

C: OF COURSE, NOOOOO, HE WAS AFTER THE COMMUNISTS.

O: AH, HE WAS AFTER THE COMMUNISTS.

C: AS I'M TELLING YOU, TIS IS A VERY SERIOUS MATTER NOW, NOW IT IS GOING TO GET REALLY HEAVY GOING.

O: SO IT IS YOUR IDEA TO GO AHEAD WITH THE FUTURE WINE POISONING AND PLACING BOMBS?

C: YES, WE ARE GOING TO ALL ALL THE COUNTRIES TO BE CAREFUL AND, FURTHER, AS I TELL YOU, YOU ADVISE THE PAPERS AND THE PRESS CONFERENCE THAT NOW IT IS GOING TO BE HARD, NOT JUST THREATS

O: SO THE OTHER WAS ONLY A JOKE?

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C: A LITTLE JOKE THAT WAS PLAYED.

O: YES.

C: IT HAD REPERCUSSION, THEY TRAVELLED, THEY ATE AND DRANK, AND HAD A GOOD TIME.

O: PERFECT.

C: THEY EVEN RECEIVED A LOT OF MONEY. MMMMMM? UNDERSTAND?

O: YES, OF COURSE, WHAT I WOULD LIKE TO KNOW SIR, BECAUSE MAYBE THE COMMUNICATIONS MEDIA WOULD BE INTERESTED IN KNOWING, IS REALLY WHO YOU SPECIFICALLY REPRESENT?

C: EHH, LOOK. THINK IT OVER CAREFULLY, MAKE OUT THAT THIS IS MISSION IMPPSSIBLE, THOSE SAME AMERICAN MOVIES WE GET HERE, BUT IT IS SERIOUS, AND INFORM, INFORM, MAYBE IF YOU INFORM WELL ABOUT THE UNI UNIIIDAD DE FOMENT, THESE THINGS WE ARE DOING, NESCAFE PROPAGANDA SPENDING 25 OR 25 MILLION WEEKLY

O: MM

C: THE SALARIES OF THE WORKERS, MM, ARE GRAVE SITUATIONS, I WISH YOU HAD RECORDED THIS, THEN LET THE BOMB EXPLODE AND YOU SAY THAT IT IS THE SAME PERSON WHO CALLED YOU THE OTHER TIME THREE OR FOUR MONTHS BACK ..... CALLED YOU AGAIN.

C: PERFECT, BUT WHY TO US SIR? WHY TO THE EMBASSY? WHY THE BOMBS TO US?

C: YOU ARE GUILTY OF MANY THINGS.

O: I AM AN EMPLOYEE HERE, WE ARE ALL EMPLOYEES.

C: YES, I KNOW YOU ARE AN EMPLOYEE.

O: THAT'S WHY, WERE ARE ALL CHILEANS LIKE YOU ARE.

: YES .. I'M NOT TALKING TO THE PRESIDENT OF THE UNITED STATES.

O: NO. THAT'S WHY, WE ARE ALL CHILEAN EMPLOYEES.

C: WHAT DO YOU WANT ME TO SAY?

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O: I DON'T KNOW, IT'S THAT I DON'T UNDERSTAND THAT ONE, THAT IT CAN BE OF USE TO KILL INNOCENT PEOPLE, SIR.

C: PLANES FALL, HOW MANY DID THE CHINESE KILL THERE?

O: YES, BUT THOSE ARE THE CHINESE.

C: YES, BUT THE CHINESE, YOU TELL ME HOW MANY THEY KILLED? WE ARE INTERESTED IN THE LIVES OF OTHERS.

C: THAT MEANS YOU ARE NOT INTERESTED IN HUMAN LIFE?

C: NO, NOT IN THE LEAST. BECAUSE WE ARE GOING AGAINST THE BAD AND NOT AGAINST THE GOOD.

O: THE THING IS THAT YOU ARE KILLING THE GOOD ONES TOO.

C: NO, NO, WE KNOW VERY WELL WHAT WE ARE DOING, SENORITA.

O: OH, WELL,

C: YES, SO THAT DOES NOT INTEREST US THAT THEY BRING ANYTHING FROM THERE, THE FEDERALS, THE FBI, THE INTERPOL, IF THEY LIKE THEY CAN BRING THE UNTOUCHABLES (HE LAUGHS IRONICALLY AT HIS OWN COMMENT), ALRIGHT, SENORITA, INFORM

O: IS THERE ANYTHING ELSE YOU WOULD LIKE TO SAY SIR?

C: NO, THAT'S ENOUGH.

O: VERY WELL

C: JUST BE CAREFUL

O: WE WILL BE CAREFUL SIR

C: VERY CAREFUL

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MONTEVIDEO FOR LEGATT

E.O. 12356: DECL: ORDR

TAGS: ASEC, PTER, CI

SUBJECT: ANONYMOUS CALL TO CHANCERY

D: THANK YOU VERY MUCH.

GODARD

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Supreme Court, U.S.
FILED
MAY 22 1995
OFFICE OF THE CLERK

No. 94-1722

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JULIA SAAVEDRA BALMACEDA, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AS *AMICI CURIAE* OF THE DELAWARE RIVER PORT AUTHORITY AND THE PORT OF PHILADELPHIA AND CAMDEN, INC.

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QUESTION PRESENTED

Was the majority of the in banc Court of Appeals for the Third Circuit (by a 7-6 vote) correct in affirming the dismissal of complaints filed by Chilean businesses under the Federal Tort Claims Act for harm caused by the non-discretionary conduct of government laboratory technicians in negligently testing and falsely reporting the presence of cyanide in Chilean fruit, when, contrary to the allegations of the complaints and in the absence of a record, the Third Circuit majority based its affirmance on a characterization of the complaints as seeking damages caused by discretionary governmental actions occurring subsequent to the negligent laboratory testing?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

DESCRIPTION OF *AMICI CURIAE* 1

INTEREST OF *AMICI CURIAE* 2

ARGUMENT 6

I. THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT SHOULD NOT BE CONSTRUED TO PREVENT A MERITS-BASED REVIEW OF A CLAIM ALLEGING NEGLIGENCE IN FDA LABORATORY TESTING 6

II. THE ISSUES RAISED BY THE PETITION INVOLVE MATTERS OF SIGNIFICANT INTERNATIONAL CONCERN AND SHOULD BE RESOLVED BY THIS COURT 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: Page

Alabama Elec. Corp., Inc. v. United States, 769 F.2d 1523 (11th Cir. 1985) 6

Andrulonis v. United States, 952 F.2d 652 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 2992 (1992) 6

Appley Bros. v. United States, 7 F.3d 720 (8th Cir. 1993).. 8

Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992) 6

Berkovitz v. United States, 486 U.S. 531 (1988)..... 6

Fisher Bros. Sales, Inc., et al. v. United States, 46 F.3d 279 (3d Cir. 1995)..... 3

Indian Towing Co. v. United States, 350 U.S. 61 (1955)... 7

Kennewick Irrigation Dist. v. United States, 880 F.2d 1018 (9th Cir. 1989) 6

STATUTES

Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301-394..... 6

Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680... 3, 6

MISCELLANEOUS

North American Free Trade Agreement 7, 8

Uruguay Round Trade Agreements..... 7

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THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AS *AMICI CURIAE* OF THE DELAWARE RIVER PORT AUTHORITY AND THE PORT OF PHILADELPHIA AND CAMDEN, INC.

Amici Curiae, the Delaware River Port Authority ("DRPA") and The Port of Philadelphia and Camden, Inc. ("PPC"), submit this brief in support of the pending Petition for Writ of Certiorari in the above-captioned appeal.[1]

DESCRIPTION OF *AMICI CURIAE*

The DRPA is a public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey created by Compact entered into between Pennsylvania and New Jersey and approved by the United States Congress.

1. DRPA and PPC obtained the consent of all Petitioners and the consent of the Respondent, the United States of America, to file this brief. Evidence of such consent has been filed with the Clerk of the Court.

Among the powers granted to the DRPA by the Compact is the power to effect the unification of the ports of the Delaware River. Another specifically granted power is to promote the use of the Delaware River as a highway of commerce, including the promotion of passenger and freight commerce on the river. Consistent with these powers, the DRPA created PPC as a subsidiary in 1994. The DRPA port district includes Philadelphia, Pennsylvania and its four surrounding counties and Camden, New Jersey and seven other Southern New Jersey counties. Although PPC is specifically responsible for port related issues including commerce, the DRPA retains the general power to operate in this area also.

DRPA is governed by sixteen commissioners—six appointed by the Governor of Pennsylvania (two sitting as ex-officio commissioners as a result of their election to office in Pennsylvania) and eight appointed by the Governor of New Jersey with the consent of the New Jersey Senate. PPC is governed by eighteen directors—four appointed by the governor of Pennsylvania, four appointed by the Pennsylvania Legislature, one appointed from the Pennsylvania delegation to the DRPA Commission, and nine appointed by the Governor of New Jersey with the consent of the New Jersey Senate.

Oversight of international imports and exports at the port facilities within the DRPA's port district is predominately within the control of PPC. As part of the unification effort, the World Trade Division of DRPA (the "WTD") has been transferred to PPC. The WTD has monitored the importation of Chilean fruit since that fruit was first handled in the ports of Philadelphia and Camden in 1984. Chilean fruit quickly emerged as one of the most significant commodities handled in these ports, and it remains one of their most significant commodities to this date.

INTEREST OF *AMICI CURIAE*

Fresh fruit from Chile has, for over a decade, been one of the most significant commodities handled at the port facilities of Philadelphia and Camden. The Chilean Grape Crisis of 1989, which resulted in a multi-week embargo of Chilean fruit

during the height of the 1988-1989 fruit season, has been the most disruptive event connected with the importation of Chilean fruit since that fruit first came to Philadelphia and Camden. The effects of the crisis were devastating to entities involved at every level of the Chilean fruit trade—predominantly growers, exporters and importers of Chilean fruit. The embargo, and subsequent import restrictions, which were in effect from March to April of 1989, occurred during the height of the import season and resulted in the destruction of approximately 6,200,000 cases of fruit and the exclusion of millions more cases of Chilean fruit. The embargo and the destruction of fruit were the result of the purported finding of cyanide in two grape berries delivered to Philadelphia from Chile, which had been tested for contamination in the Philadelphia laboratory of the Food and Drug Administration (the "FDA").

Approximately 2,400 growers, exporters and importers of Chilean fruit have brought claims against the United States seeking money damages for losses incurred as a result of negligence on the part of the FDA in its laboratory testing of Chilean fruit. Those claims are founded upon the United States waiver of sovereign immunity contained in the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (the "Tort Claims Act" or the "Act"), for losses caused by the negligence of United States employees. In the cases brought by the Chilean entities, they have alleged negligence on the part of FDA laboratory technicians in testing the two grape berries and reporting a positive finding of cyanide contamination. All claims brought under the FTCA have been dismissed pursuant to the discretionary function exception, 28 U.S.C. § 2680(a), and those dismissals have been affirmed by the in banc Third Circuit Court of Appeals by a 7 to 6 vote. *Fisher Bros. Sales, Inc., et al. v. United States,* 46 F.3d 279 (3d Cir. 1995), Pet. App. 1a-24a. As a result of the divided Third Circuit's ruling, there has been no merits-based review of the claim that FDA negligence resulted in the mistaken report of cyanide contamination in Chilean fruit. No compensation has been paid by the United States to any entity which incurred losses as a result of the 1989 embargo.

DRPA and PPC have filed this brief as *Amici Curiae* because of their strong interest in assuring that businesses using the port facilities of Philadelphia and Camden receive a full and fair opportunity to present for review to the United States courts legitimate claims for harm caused by government negligence in the regulation of trade. DRPA and PPC support the right of the Chilean businesses to present claims for damages caused by the non-discretionary negligence of United States employees in testing imported Chilean fruit for contamination, and to have a fair review of the merits of these claims within the judicial system of the United States.

The interest of *Amici Curiae* can be best understood from basic data on the importance of Philadelphia and Camden as ports of entry for Chilean fruit and on the corresponding importance of Chilean fruit traffic to the economies of Philadelphia and Camden. Philadelphia and Camden are the significant ports of entry for fruit and vegetables in the North Atlantic. Their share of the North Atlantic importation of fruits and vegetables has risen from approximately 12% in 1984 to approximately 33% ten years later. *See Amici Curiae* Appendix ("Am. App.") at 1a. By 1992-1993, fruits and vegetables made up 20-25% of the total import tonnage of general cargo to the ports of Southeastern Pennsylvania and Southern New Jersey. Am. App. at 2a.[2] During the ten year period 1984-1993, the Chilean share of North Atlantic imports of fruits and vegetables grew from 31% to 50% of the totals. Am. App. at 3a. The major share of the Chilean fruit imported to the North Atlantic has been handled at the ports in Philadelphia and Camden, and that share has ranged from a high of 98% in 1984 to a low of 70% in 1993. Am. App. at 4a and 5a.

The interest of DRPA and PPC is also reflected in the positive economic impact upon Philadelphia and Camden (and their surrounding regions) by the presence of Chilean fruit traffic at the local port facilities. The WTD has calculated the number of cases of Chilean fruit handled at the local ports from the 1986-87 season to the 1992-93 season as follows:

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2. General cargo excludes "bulk" cargo, which is predominantly composed of petroleum products and metal ores.

Import Season	Cases Handled
1986-87	27,176,250
1987-88	32,058,412
1988-89	30,364,190
1989-90	37,686,368
1990-91	31,606,093
1991-92	33,541,546
1992-93	32,425,000

From these numbers, WTD approximates the economic impact of the Chilean fruit traffic by calculating direct economic transactions (stevedoring wages, dockage and wharfage income, pilot and tug services, fumigation services and importer mark-up) and by calculating a total economic impact by using a multiplier of 1.5. Using this methodology, WTD approximated the direct and total economic impact for three recent seasons as follows:

Import Season	Direct Economic Impact	Total Economic Impact
1986-87	$45,780,000	$114,450,000
1988-89	$47,211,000	$118,027,500
1992-93	$54,159,000	$135,398,000

Given the enormous impact of the Chilean fruit trade to the Philadelphia-Camden region, DRPA and PPC monitor any events that could disrupt the flow of that commodity to the United States generally. The Chilean Grape Crisis of 1989 has been the most significant event in the course of the trade since Chilean fruit came to Philadelphia in 1984. Growers, importers and exporters seek damages in excess of $210 million as a result of the crisis. The concern of DRPA and PPC is that to date, now more than six years after the event, entities damaged by the negligence of the FDA laboratory have been unable to obtain a merits-based review of their claim that their damages were caused by the non-discretionary negligence of United States employees. Because the in banc Third Circuit has dismissed the complaints in the absence of any record, the claimants have been unable to present any evidence in support of their well-pleaded claims that laboratory negligence resulted in the incorrect finding and reporting of the presence of cyanide in two grape berries unloaded at the Port of Philadelphia in March 1989.

ARGUMENT

I. THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT SHOULD NOT BE CONSTRUED TO PREVENT A MERITS-BASED REVIEW OF A CLAIM ALLEGING NEGLIGENCE IN FDA LABORATORY TESTING.

As a major import center for fruit and vegetables from foreign countries, the ports of Philadelphia and Camden work closely with FDA officials, whose responsibilities include enforcement of the Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301-394 (the "FDCA"). As part of that statutory scheme, the FDA may engage in the inspection and testing of fruit imported for domestic consumption. Indeed, those are the precise acts at issue in the cases at hand.

The acts of inspecting and testing fruit are important ones, which affect vast amounts of commerce. By operation of the Tort Claims Act, those acts, as conducted by United States employees, may form the basis of a claim for money damages if the acts are performed negligently and the negligence causes harm. 28 U.S.C. § 1346(b). Some of these inspecting and testing activities do not meet the criteria for application of the discretionary functionary exception to the Tort Claims Act. 28 U.S.C. § 2680(a). *See Berkovitz v. United States,* 486 U.S. 531, 536 (1988). Specifically, because some of the FDA's conduct in connection with incoming fruit and vegetables are purely mechanical, scientific or technical in nature, those acts are not discretionary. *See, e.g., Ayala v. United States,* 980 F.2d 1342, 1349-50 (10th Cir. 1992); *Andrulonis v. United States,* 952 F.2d 652, 654-55 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 2992 (1992); *Kennewick Irrigation Dist. v. United States,* 880 F.2d 1018, 1031 (9th Cir. 1989); *Alabama Elec. Corp., Inc. v. United States,* 769 F.2d 1523, 1531 (11th Cir. 1985).

The decision of the in banc majority of the Third Circuit in the cases at hand has effectively immunized the non-discretionary scientific or technical conduct of the FDA from liability under the Tort Claims Act. Under the Third Circuit's ruling, FDA laboratory technicians may, without judicial review, negligently administer standard laboratory tests and

erroneously report findings of contamination in imported fruits and vegetables, thereby leading to the mass destruction of those products. This harm will go unreviewed and uncompensated if some arguably discretionary decision is made subsequent to the negligent, non-discretionary testing. Such a result effectively nullifies Congress' waiver of sovereign immunity for negligent conduct reflected in the Tort Claims Act. The result is also contrary to this Court's holding in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), requiring that once undertaken, non-discretionary acts of United States employees must be conducted in a non-negligent manner.

II. THE ISSUES RAISED BY THE PETITION INVOLVE MATTERS OF SIGNIFICANT INTERNATIONAL CONCERN AND SHOULD BE RESOLVED BY THIS COURT.

DRPA and PPC have reviewed the Petition for Writ of Certiorari and respectfully request that this Court issue the Writ. Of most significant concern to the DPRA and PPC is the importance of the issue raised to international trade with Chile, and indeed with all other trading partners of the United States that utilize the ports of Philadelphia and Camden.

Two basic principles of international trade have been compromised by the rulings of the district court and the Third Circuit majority in this case. First, the inspection and review procedures applied by government agencies to international trade should be open and rational, not secret and arbitrary. The principle of "transparency" has received increased importance in international trade. *See* H. Doc. 103-316, v. 1, Uruguay Round Trade Agreements, at p. 59, § 126 (instructing United States Trade Representative to "seek . . . broader application of the principle of transparency"). Second, if there are legitimate disputes regarding the inspection and review procedures applied by a government agency, there should be some reasonable procedure for the adjudication of such disputes. This principle has been codified most recently in the North American Free Trade Agreement ("NAFTA"), to which Chile may be, ironically, the next country to accede. *See* NAFTA Art. 1804 (mandating that country parties afford other parties "a reasonable opportunity to present facts and

arguments prior to any final administrative action"). Here, in contravention of these basic principles, the negligence of the FDA's Philadelphia laboratory has been insulated from scrutiny, and the Plaintiffs have been precluded from having any merits-based review of their claims within the judicial system of the United States.

The split between the Third Circuit in these cases and the Eighth Circuit in *Appley Bros. v. United States,* 7 F.3d 720 (8th Cir. 1993), raises further concerns about the incorrectness of the Third Circuit's ruling with respect to international trade. The Eighth Circuit has permitted a merits-based review of claims of negligent government inspection with respect to domestic commerce—negligent inspection of grain stored by United States agricultural interests in a domestic grain storage facility. The Third Circuit majority, in contrast, has prohibited a merits-based review of claims of negligent government inspection with respect to international commerce— negligent government inspection of Chilean fruit imported into the Philadelphia port facility. This differential treatment of domestic and foreign commerce subject to government inspection raises concerns about the basic fairness of the United States procedures for addressing disputes regarding the inspection of international commerce.

In these cases, international businesses damaged by the FDA's embargo have been told, in essence, that employees of the United States are at liberty to commit negligence, and that well-pleaded allegations of non-discretionary negligence will not even be heard on the merits by the courts of the United States. DRPA and PPC agree with the Petitioners that the Third Circuit's ruling in these cases is incorrect. At the very least, these cases should be reviewed by this Court.

CONCLUSION

DRPA and PPC respectfully request this Court to issue a Writ of Certiorari in these cases.

Respectfully submitted,

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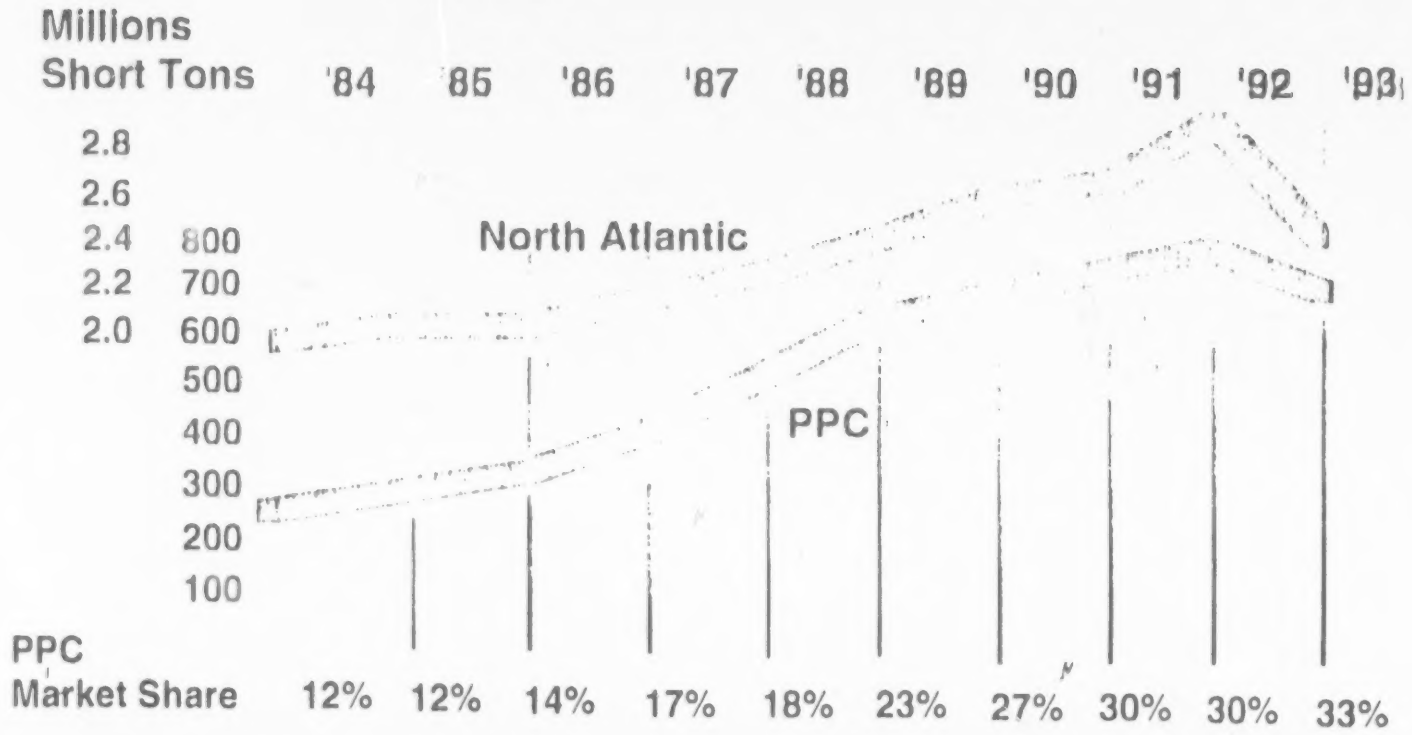
Dated: May 22, 1995

APPENDIX

The Port of **Philadelphia and Camden**

North Atlantic Ports / PPC
Imports of Fresh Fruits and Vegetables
1984-1993



IMPORTS

THE PORTS OF PHILADELPHIA AND CAMDEN ***
PRELIMINARY
INTERNATIONAL WATERBORNE COMMERCE
CALENDAR YEAR 1992 VS 1993
(IN SHORT TONS)

	STONS CY 1992	$ 000 CY 1992	STONS CY 1993	$ 000 CY 1993	STONS CHANGE	STONS % CHANGE
TOTAL CARGO	55,723,410	10,335,817	60,989,653	10,239,307	5,266,243	9%
BULK CARGO	51,727,807	5,987,262	56,701,560	5,805,448	4,973,753	10%
GENERAL CARGO	3,995,603	4,348,555	4,288,093	4,433,864	292,490	7%
BULK CARGO						
PETROLEUM & PETROLEUM PRODS *	47,645,987	5,777,290	51,634,218	5,552,461	3,988,231	8%
METAL ORES AND SCRAP	3,078,122	125,131	3,672,236	152,119	594,114	19%
FERTILIZERS CRUDE AND MINERALS	758,727	12,118	987,006	19,857	228,279	30%
COAL AND COKE	107,924	3,603	143,903	4,748	35,979	33%
GAS NATURAL AND MANUFACTURED	36,822	3,966	112,254	10,325	75,432	205%
FERTILIZERS AND MATERIALS	41,964	5,253	98,211	9,972	56,227	134%
ALL OTHER BULK CARGO	58,241	59,879	53,732	55,961	(4,509)	-8%
GENERAL CARGO						
FRUITS AND VEGETABLES	925,014	516,644	859,533	408,434	(65,481)	-7%
PAPER AND PAPERBOARD	437,822	294,700	761,120	482,365	323,298	74%
CHEMICALS **	606,303	478,969	704,647	474,240	98,344	16%
IRON AND STEEL	688,499	447,102	606,797	381,174	(81,702)	-12%
MEAT AND MEAT PREPARATIONS	340,108	716,714	332,507	778,247	(7,601)	-2%
PLYWOOD, WOOD/CORK MFRS.	250,939	183,963	250,868	186,080	(71)	-0%
COCOA, COFFEE AND TEA	165,424	201,501	213,749	226,456	48,325	29%
PULP AND WASTE PAPER	138,356	56,234	109,938	25,379	(28,418)	-21%
LUMBER, WOOD AND CORK	55,169	21,332	75,268	30,101	20,099	36%
BEVERAGES	50,027	53,300	44,435	37,350	(5,592)	-11%
ALL OTHER GENERAL CARGO	335,942	1,398,076	329,231	1,404,038	(6,711)	-2%

* Oils, lubes, and greases are not separated from bulk
** Chemicals contain both bulk and general cargo
*** Comprised of ports in Southeastern Pennsylvania and Southern New Jersey

SOURCE: U.S. Department of Commerce, Bureau of the Census
JTS Associates
COMPILED BY: DRPA/WTD

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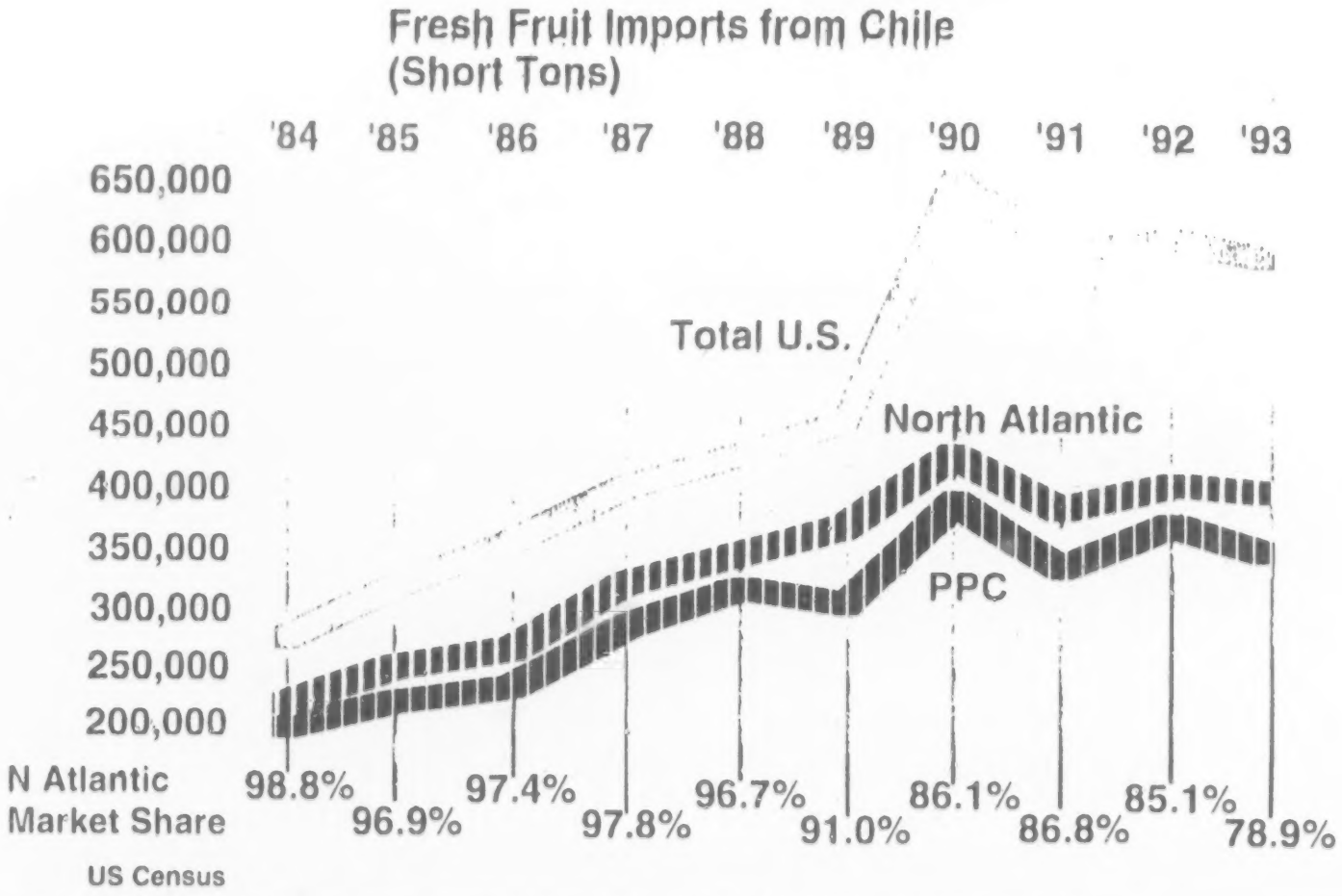
The Port of Philadelphia and Camden

Imports of Fresh Fruit and Vegetables
North Atlantic Ports Marketshare
By Trade Route 1984-1993

	'84 %	'85 %	'86 %	'87 %	'88 %	'89 %	'90 %	'91 %	'92 %	'93 %	
CA / Carib	-	-	-	-	-	22	34	35	28	31	+31%
W Coast SA	31	30	32	39	39	34	34	37	45	50	+23%
Mediterranean	1	2	2	2	2	5	3	4	1	1	-37%
E Coast SA	3	5	14	20	45	31	25	32	29	27	+3875%
S East Asia	1	-	4	18	18	4	1	-	-	-	+13%
North Europe	5	16	16	3	9	8	6	3	1	1	-57%
Australia / NZ	9	17	74	17	14	11	11	16	16	33	+203%
China / Korea	6	4	3	1	3	5	1	-	-	-	-

The Port of **Philadelphia and Camden**



IMPORTS OF FRESH FRUITS & VEGETABLES (IN SHORT TONS)
DATA SOURCE: THE CENSUS BUREAU

FROM CHILE

	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
TOTAL U.S.	277,393	325,373	354,411	438,642	492,409	505,489	649,809	585,018	604,593	592,812
NORTH ATLANTIC	228,088	242,130	262,008	330,232	360,102	361,578	469,239	391,492	420,658	417,346
PHILADELPHIA	225,360	234,730	255,374	323,234	348,392	329,208	404,065	340,127	358,105	329,357

	1994	1995	1996	1997	1998	1999	2000
TOTAL U.S.	645,142	666,129	687,115	708,102	729,089	750,076	771,062
NORTH ATLANTIC	441,974	452,994	464,015	475,035	486,055	497,076	508,096
PHILADELPHIA	344,300	342,231	340,162	338,093	336,023	333,954	331,885

(3)

Supreme Court, U.S.
FILED
JUL 21 1995

No. 94-1722

In the Supreme Court of the United States

OCTOBER TERM, 1995

JULIA SAAVEDRA BALMACEDA, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' claims for damages resulting from a decision by the Commissioner of the Food and Drug Administration to take measures to protect the domestic food supply in light of information suggesting that fruit imported from Chile had been injected with cyanide.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Appley Bros. v. *United States*, 7 F.3d 720 (8th Cir. 1993)	10, 11, 12
Berkovitz v. *United States*, 486 U.S. 531 (1988)	7
Bramer v. *United States*, 595 F.2d 1141 (9th Cir. (1979)	6, 7
Dalehite v. *United States*, 346 U.S. 15 (1953)	7
Kosak v. *United States*, 465 U.S. 848 (1984)	6
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	8
Patterson v. *United States*, 856 F.2d 670 (1988), vacated, 866 F.2d 1538, on reh'g, 881 F.2d 127 (4th Cir. 1989)	10, 11
United States v. *Gaubert*, 499 U.S. 315 (1991)	8, 10
United States v. *Neustadt*, 366 U.S. 696 (1961)	8
United States v. *Varig Airlines*, 467 U.S. 797 (1984)	7

Statutes and rule:

Federal Tort Claims Act:	
28 U.S.C. 1346(b)	3
28 U.S.C. 2671-2680	3
28 U.S.C. 2680(a)	3, 5, 6, 9, 10
28 U.S.C. 2680(c)	6
28 U.S.C. 2680(h)	8
Fed. R. Civ. P. 12(b)(6)	8

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-24a) is reported at 46 F.3d 279. The opinion of the court of appeals panel (Pet. App. 28a-49a) is unreported. The memorandum and order of the district court dismissing the case (Pet. App. 50a-57a) is reported at 815 F. Supp. 823.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a-27a) was entered on January 25, 1995. The petition for a writ of certiorari was filed on April 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 2 and 7, 1989, the United States Embassy in Chile received anonymous telephone calls stating that Chilean fruit bound for the United States had been or would be injected with cyanide. In response to those calls, the Food and Drug Administration (FDA) increased inspections of fruit imported from Chile. On March 11, 1989, the FDA found three suspicious-looking grapes in a crate of grapes from Chile. Two of the grapes had puncture marks surrounded by white rings; the third had a slit surrounded by white rings. The FDA sent the grapes to an FDA laboratory in Philadelphia, Pennsylvania, for testing. Pet. App. 5a-6a.

Technicians at the Philadelphia lab macerated the two punctured grapes and found that the resulting slurry tested positive for cyanide. The technicians reported that finding to FDA officials in Washington and sent the slurry, as well as the intact (slit) grape, to an FDA lab in Cincinnati, Ohio, for further testing. The Cincinnati lab was unable to confirm the presence of cyanide in either the slurry or the intact grape. The Commissioner of the FDA nonetheless decided to take protective measures. On March 13, 1989, he temporarily banned the importation of Chilean fruit; he urged the withdrawal from the domestic market of Chilean fruit that had already been imported; and he notified the public of those actions and of the evidence of cyanide tampering. The ban on importation was lifted on March 17, 1989, after no further evidence of tampering was found. Pet. App. 6a-7a.

2. Petitioners are growers, shippers, exporters, and importers of Chilean fruit. See Pet. App. 7a.

They brought six actions, later consolidated, in the United States District Court for the Eastern District of Pennsylvania, seeking damages from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. They alleged that, in testing the grapes, the FDA lab technicians in Philadelphia had departed in certain respects from the FDA's Regulatory Procedures Manual and from accepted laboratory procedures. See, *e.g.*, C.A. App. 173-174. They further alleged that, "[a]s a direct and proximate result of FDA's negligent laboratory analysis," they suffered more than $210 million in damages. *E.g.*, *id.* at 161. The government moved to dismiss the actions on the ground that they were barred by the discretionary function exception to the FTCA.[1] The district court granted the motion,

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[1] The FTCA generally waives the sovereign immunity of the United States from claims

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b). That waiver is subject to certain exceptions. The exception relevant here, the discretionary function exception, 28 U.S.C. 2680(a), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a

holding that "the FDA is protected by the discretionary function exception." Pet. App. 56a.

3. A divided panel of the court of appeals reversed the order of dismissal and remanded the case for further proceedings. Pet. App. 28a-49a. The en banc court of appeals vacated the panel's decision, however, and by a 7-6 vote affirmed the dismissal of the case. *Id.* at 1a-24a.

The en banc court began by setting out the "two-pronged inquiry" for determining "[w]hether the discretionary function exception applies" (Pet. App. 9a):

> "[A] court must first consider whether the action is a matter of choice for the acting employee." *Berkovitz* [v. *United States*, 486 U.S. 531, 536 (1988)]. Second, the court must determine whether the element of judgment involved "is of the kind that the discretionary function exception was designed to shield." [*Ibid.*] Under this second prong, the court must determine whether the challenged discretionary actions or decisions were "based on considerations of public policy." *Id.* at 537. "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

The court determined that the decision of the FDA Commissioner to take protective measures with regard to Chilean fruit was within his discretion and

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discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

involved the type of discretion that the discretionary function exception was designed to protect. *Id.* at 10a-11a. The court rejected petitioners' argument that, for purposes of determining whether the exception applied, their claims were not "based upon" (28 U.S.C. 2680(a)) the Commissioner's decision but instead upon the actions of the FDA lab technicians who tested the grapes. Pet. App. 11a-13a.

The dissenting judges believed that dismissal was improper because "the actions of the laboratory technicians, in testing the grapes, * * * are not protected by the [discretionary function] exception." Pet. App. 19a. In the dissent's view, the Commissioner's later decision to take protective steps was irrelevant to the application of the exception. *Id.* at 21a-22a. The dissent recognized, however, that petitioners "may encounter difficulty in attempting to prove that the alleged negligence of the lab technicians, rather than the Commissioner's decision, was the proximate cause of their injuries." *Id.* at 22a n.1.

ARGUMENT

1. The discretionary function exception to the FTCA preserves the sovereign immunity of the United States from tort claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. 2680(a). The court of appeals held that the exception barred petitioners' claims because, for purposes of Section 2680(a), those claims were "based upon" the FDA Commissioner's decision, in light of information suggesting possible cyanide tampering, to take protective measures with respect

to Chilean fruit, and because that decision involved an exercise of the type of discretion that the exception was designed to protect. Pet. App. 4a, 9a-14a.

Petitioners do not dispute that the Commissioner's decision falls squarely within the discretionary function exception. Instead, they contend (Pet. 12) that their claims are not "based upon" his decision, but upon the FDA's allegedly negligent testing of the three suspicious-looking Chilean grapes. They argue that they have avoided the discretionary function's bar to a challenge to the Commissioner's decision by "plead[ing], properly under Pennsylvania law (the state in which the testing occurred), that non-discretionary laboratory negligence caused their losses." Pet. 13. Thus, according to petitioners, the court of appeals erred by "fail[ing] to accept the allegations of causation contained in the complaints and * * * fail[ing] to apply Pennsylvania's law of negligence." Pet. 11; see also Pet. 13-14.

The court of appeals correctly determined (see Pet. App. 12a) that federal law, not state law, governs the question in this case of what government conduct petitioners' claims are "based upon." That question arises because a federal statute, 28 U.S.C. 2680(a), bars tort claims "based upon" the performance of a discretionary function. Cf. *Kosak* v. *United States*, 465 U.S. 848, 851-862 (1984) (federal law governs question whether plaintiff's claim "ar[ose] in respect of * * * the detention of any goods or merchandise by any officer of customs" for purposes of 28 U.S.C. 2680(c)); *Bramer* v. *United States*, 595 F.2d 1141, 1144 & n.7 (9th Cir. 1979).

Nor did the court of appeals "fashion[] a federal common law standard," as petitioners assert. Pet. 13; see also Pet. 22. The court based its decision

squarely on the text of the federal statute. That is clear from the court's repeated references to the operative statutory phrase "based upon." See, *e.g.*, Pet. App. 4a, 8a, 12a, 13a. Neither did the court "deviat[e]" (Pet. 22) from decisions of this Court by interpreting the discretionary function exception in light of its purposes. This Court has made clear that those purposes are relevant to a "proper[] construc[tion]" of the exception. *Berkovitz* v. *United States*, 486 U.S. 531, 537 (1988); see also *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984) (reviewing legislative history "for a proper understanding of the application of the discretionary function exception to this case"); *Dalehite* v. *United States*, 346 U.S. 15, 32-34 (1953).

Petitioners err in arguing that their claims cannot be barred by federal law because they "pleaded all of the requirements of causation under Pennsylvania's law of negligence." Pet. 21; see also Pet. 13-14. Petitioners confuse the issue whether they made out the elements of a tort claim under Pennsylvania law with the quite different issue whether such a claim was barred as a matter of federal law by the discretionary function exception to the FTCA. When the discretionary function exception applies, the government's sovereign immunity is preserved and state rules of substantive liability do not come into play. See *Bramer*, 595 F.2d at 1144 n.7 ("State tort law 'applies' to the federal government only to the extent that there has been a 'clear relinquishment of sovereign immunity.'") (quoting *Dalehite*, 346 U.S. at 31).

Petitioners also err in arguing (Pet. 21-22) that they foreclosed the application of the discretionary function exception by pleading that their damages

were caused by negligent lab testing (rather than the Commissioner's decision). This Court has consistently rejected the notion that plaintiffs may avoid the bar of sovereign immunity by artful pleading. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949). The Court has rejected an argument that 28 U.S.C. 2680(h), which excludes from the FTCA tort suits "arising out of" negligent misrepresentation, "does not apply * * * when the claim is phrased as one 'arising out of' negligence rather than 'misrepresentation.'" *United States* v. *Neustadt*, 366 U.S. 696, 703 (1961). Here, the court of appeals correctly rejected petitioners' argument that they could avoid the discretionary function exception's bar to a challenge to the Commissioner's discretionary decision merely by alleging that their claims were based, not on that discretionary decision, but on antecedent, nondiscretionary government conduct.[2]

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[2] For similar reasons, petitioners err in asserting that "this Court now needs to establish a standard for reviewing the sufficiency of a complaint's allegations as to the governmental conduct, preceding a loss, that may properly be pleaded as the legal and proximate cause of the harm." Pet. 13. The discretionary function exception imposes a substantive limit on the FTCA's waiver of sovereign immunity, not merely a pleading requirement. The applicability of the exception is not controlled by what conduct a plaintiff alleges as the "legal and proximate" cause of the damages.

Petitioners observe (Pet. 20) that, in ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept the factual allegations in the complaint as true. See, *e.g.*, *United States* v. *Gaubert*, 499 U.S. 315, 327 (1991). The courts below adhered to that principle. Pet. App. 5a, 50a. As the court of appeals recognized, however, that principle did not require it to accept petitioners' *legal* contention that, on the facts alleged

Finally, the court of appeals correctly applied the statutory standard in holding that petitioners' claims were "based upon" the Commissioner's discretionary decision to take protective measures in regard to Chilean fruit. The FTCA exception applies to suits "based upon the exercise or performance * * * [of] a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. 2680(a). Application of the exception thus does not require that a suit be based *exclusively* upon exercise of a discretionary function. Petitioners' suit was necessarily based at least in part upon the Commissioner's decision to adopt protective measures in regard to Chilean fruit, even though it also was based in part on allegedly negligent lab testing. The alleged negligence of the Philadelphia lab testing itself resulted in no harm to petitioners. It was the discretionary action that the Commissioner took in light of that testing (and the other information before him) that caused the harm and that was therefore a necessary element of petitioners' claim. Pet. App. 22a. In deciding whether to act and what action to take, the Commissioner had broad discretion in responding to the conflicting test results received from Philadelphia and Cincinnati, the anonymous phone calls, and the other information in his possession. The positive finding of the Philadelphia lab in no way compelled him to make the decision that he made. The Commissioner could have ordered more testing or other measures that could have resulted in

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in their complaints, their claims were "based upon" the FDA's allegedly negligent laboratory testing rather than the FDA Commissioner's subsequent decision to take protective measures with regard to Chilean fruit. See Pet. App. 12a-13a.

either no damages to petitioners or damages quite different from those alleged.[3] The discretionary function exception applies under such circumstances. If it did not, a discretionary governmental decision allegedly resulting in harm would be subjected to FTCA liability, which is the very result the discretionary function exception was designed to prevent.

2. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Petitioners recognize (Pet. 13, 18) that no decision of this Court is on point. They cite only two court of appeals decisions concerning the question of what government conduct a plaintiff's claim is "based upon" for purposes of Section 2680(a). See Pet. 14-17 (citing *Patterson* v. *United States*, 856 F.2d 670 (1988), vacated, 866 F.2d 1538, on reh'g, 881 F.2d 127 (4th Cir. 1989) (en banc), and *Appley Bros.* v. *United States*, 7 F.3d 720 (8th Cir. 1993)). Neither of those decisions conflicts with the decision below.

In *Patterson*, the plaintiffs claimed that a mine inspector from the federal Office of Surface Mining (OSM) negligently reported on the conditions at a mine, and that his negligence caused OSM to decide not to use emergency funds to ameliorate conditions at the mine. 856 F.2d at 671. The plaintiffs purported

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[3] Petitioners argue that "there is no record whatsoever as to the conduct of the FDA Commissioner" from which the court of appeals could assess its discretionary nature. Pet. 20. The court, however, properly accepted as true the allegations in petitioners' complaint describing the Commissioner's decision, Pet. App. 5a, and determined, in light of the statutes and regulations governing the Commissioner's authority under the circumstances alleged, that his decision was "susceptible to policy analysis," *id.* at 9a (quoting *Gaubert*, 499 U.S. at 325); see also *id.* at 10a n.1 (citing relevant statutes and regulations).

to challenge only the inspector's conduct, and not OSM's subsequent discretionary decision not to spend emergency funds. *Id.* at 673. A Fourth Circuit panel held that the discretionary function exception did not bar the action, because the inspector had violated nondiscretionary federal guidelines. *Id.* at 673-674. The en banc court vacated the panel's decision, however, holding that the exception did bar the action, in light of the discretionary nature of OSM's decision not to spend emergency funds. 881 F.2d at 128.

Patterson is thus analogous to and fully consistent with the present case. There, as here, the plaintiffs' claim was based on the effects of a discretionary decision that was, in turn, caused by a nondiscretionary decision that was alleged to be negligent. Since the discretionary decision was the immediate cause of harm to the plaintiffs, the discretionary function exception was applicable.

In *Appley*, a grain warehouse was operating with inventory shortages. 7 F.3d at 721. Department of Agriculture inspectors noted those shortages during an inspection, directed their elimination, and later conducted a special inspection to check compliance with the ordered elimination of the shortages. *Id.* at 721-722. Although the shortages continued, they were negligently not noted by the inspectors. *Id.* at 722. As a result, plaintiff farmers and others continued to deposit grain with the warehouse. *Ibid.* The warehouse's federal license to operate was ultimately revoked, but plaintiffs claimed that the Department of Agriculture would have revoked the license sooner, causing plaintiffs to lose less money, but for the negligence of federal warehouse inspectors. *Ibid.* The Eighth Circuit held that the

claim was not barred by the discretionary function exception. *Id.* at 725-727. The court concluded that "[t]he causative fact in [the plaintiffs'] claims is the inspectors' failure to follow the mandatory requirements of the handbook, not the Secretary's failure to revoke [the warehouse's] license." *Id* at 725-726. This was true because the inspectors' failure to determine whether inventory shortages continued to exist "prevented the Secretary from exercising discretion to decide whether to revoke [the warehouse's] license." *Id.* at 725-726.

Appley is consistent with the decision below. The claim in *Appley* was based entirely on nondiscretionary, negligent behavior that precluded a discretionary decision that would have prevented harm from taking place. In contrast to *Patterson* and the present case, plaintiffs' claim in *Appley* was not based upon harm caused by a discretionary decision.[4]

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[4] Petitioners err in contending that the decision below "departed from * * * caselaw establishing that the discretionary function exception does not apply to the technical, scientific or mechanical undertakings by federal employees." Pet. 23. Rather, the court of appeals simply held that petitioners' claims were not "based upon" such an "undertaking[]."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JULIA SAAVEDRA BALMACEDA, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Appley Bros. v. United States, 7 F.3d 720 (8th Cir. 1993)	7
Bramer v. United States, 595 F.2d 1141 (9th Cir. 1979)	3, 4
Kosak v. United States, 465 U.S. 848 (1984)	3
Patterson v. United States, 881 F.2d 127 (4th Cir. 1989)	7
United States v. Gaubert, 499 U.S. 315 (1991)	2, 4
Statutes and Rules:	
28 U.S.C. § 1346(b)	6
28 U.S.C. § 2680(a)	1, 3, 6, 7
28 U.S.C. § 2680(c)	3
Fed. R. Civ. P. 12(b)	1, 2, 3

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The Government's Brief in Opposition does not contradict, but confirms, that certiorari should be granted in these cases. The Government admits both that under Fed. R. Civ. P. 12(b), on the Government's motion to dismiss, the factual allegations of Petitioners' complaints must be accepted as true and that, when so accepted, the complaints plead a cause of action for negligence under Pennsylvania law. The Government argues that yet a third standard for testing the sufficiency of the complaints should be applied, and warrants their dismissal. This third standard purportedly derives from the text of the Federal Tort Claims Act (the "Tort Claims Act" or "Act"), specifically 28 U.S.C. § 2680(a), which exempts from

the waiver of sovereign immunity "[a]ny claim based upon" the exercise or performance of a discretionary function. Opposition Brief at 6-7.

According to the Government, the complaints were properly dismissed because they involve claims "based upon" discretionary conduct of the FDA Commissioner, and not upon the non-discretionary laboratory testing alleged in the complaints as the cause of harm. In positing this standard, the Government cites for comparison only two cases, neither of which is apposite. Moreover, the standard is inconsistent with this Court's decision in *United States v. Gaubert*, 499 U.S. 315 (1991). Furthermore, the Government fails to articulate the substantive content of the proposed standard or to show why its application would require dismissal of the complaints in these cases. If the Government is correct that a new legal sufficiency standard should apply to Tort Claims Act cases involving the discretionary function exception, then it is fundamentally important that this Court establish that standard and instruct as to its application.

Finally, all the criteria for the issuance of certiorari are satisfied. These cases are of international significance; they involve a principle of law critical to the interpretation of the Tort Claims Act; and, contrary to the Government's assertion, the Courts of Appeals are divided on that principle.

ARGUMENT

1. The complaints in these cases expressly plead that Petitioners' harm was caused by negligent, non-discretionary laboratory testing. The Government concedes that the allegations of the complaints must be accepted as true under Fed. R. Civ. P. 12(b) and that the complaints plead all of the elements of the tort of negligence under Pennsylvania law. The Government argues, nevertheless, that Tort Claims Act complaints involving the discretionary function exception must be tested under a unique legal sufficiency standard derived from the "based upon" language of the discretionary function exception. There is no legal precedent or statutory support for the Government's position.

No case, except for the Third Circuit in banc majority decision below, reads the "based upon" language of 28 U.S.C. § 2680(a) as establishing an additional pleading standard for Tort Claims Act plaintiffs. As a consequence, in support of its argument, the Government can do no more than offer a "*Cf.*" citation to one decision of this Court, *Kosak v. United States,* 465 U.S. 848 (1984), and one decision from the Ninth Circuit, *Bramer v. United States,* 595 F.2d 1141 (9th Cir. 1979). Opposition Brief at 6. Neither of these cases supports the Government's position.[1]

Neither *Kosak* nor *Bramer* support an interpretation of Section 2680(a) that would permit a Court to disregard the legal sufficiency standard of Fed. R. Civ. P. 12(b) or impose additional pleading requirements beyond the elements of state tort law incorporated by express reference in the Tort Claims Act. *Kosak* did not even involve the discretionary function exception, but rather involved the detention of goods exception. 465 U.S. at 852; 28 U.S.C. § 2680(c). The issue in *Kosak* was whether that exception encompassed harm to goods caused during the period of detention in addition to the loss in value to the goods because of the detention. This Court concluded that Section 2680(c) shielded the United States from liability from both types of losses. The Government does not explain how *Kosak,* construing Section 2680(c), supports the dismissal of these cases under Section 2680(a).

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1. In the three and a half year history of this litigation, the Government cited the *Bramer* case for the first time in its Brief in Opposition. The Government cited *Kosak* in a Supplemental Brief for the United States, filed on or about December 9, 1994, about two months after the oral argument before the in banc Third Circuit. In that Supplemental Brief, the Government, *for the first time,* argued that the "based upon" language of Section 2680(a) controlled these cases. The Government did not initially argue that the "based upon" language was dispositive. Rather, it argued that the Petitioners' damages were not caused by the FDA Commissioner's actions under ordinary tort-law principles. However, when it became apparent before the Third Circuit that the Petitioners had properly pleaded laboratory negligence as the cause-in-fact and proximate cause of their harm, the Government shifted arguments. In any event, as discussed herein, the Government's newly crafted argument is without merit.

Similarly, the Government does not explain how *Bramer* supports dismissal of the complaints at issue. In *Bramer,* the issue was whether the United States could be liable, under New Mexico law, to employees of an independent contractor for the performance of inherently dangerous work. 595 F.2d at 1144-45. The Ninth Circuit concluded, based upon a then-recent decision of the New Mexico Supreme Court, that state law did not recognize such a cause of action and, therefore, that no Tort Claims Act case was authorized. Thus, *Bramer* simply does not address the position that the Government now argues.

2. In addition to having no caselaw support, the Government's position is inconsistent with the pleading standard set forth by this Court in *United States v. Gaubert,* 499 U.S. 315 (1991). There, this Court stated: "For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." 499 U.S. at 324-25. This is precisely what the Petitioners' complaints do. Petitioners have alleged facts supporting their claim that laboratory negligence, which was not discretionary or grounded in FDA policy, was the cause-in-fact and proximate cause of their harm. If some additional pleading standard applies to complaints under the Act involving the discretionary function exception, as the Government now argues, this Court should address this issue of statutory interpretation fundamental to litigation involving the federal government.[2]

3. The reason the Government can find no legal support for its position is that it attempts to create a legal sufficiency standard out of what is in actuality a disputed issue of fact. The fallacy of the Government's argument is most clearly apparent in the Government's statement that the Court of

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2. The Petitioners contend that there should be no additional "based upon" pleading requirement. However, if the Court were to fashion such a standard, the Petitioners request that, in the event their current complaints do not meet the new test, they be permitted an opportunity to amend their pleadings since they did not previously have the benefit of knowing the additional pleading standard at the time their complaints were filed.

Appeals was not "require[d] ... to accept petitioners' *legal* contention that, on the facts alleged in their complaints, their claims were 'based upon' the FDA's negligent laboratory testing rather than the FDA Commissioner's subsequent decision to take protective measures with regard to Chilean fruit." Opposition Brief at 8-9 n. 2 (emphasis in original). Petitioners, however, do not make, and have never made, any such "*legal* contention." Whether their claims are "based upon" non-discretionary or discretionary conduct is not a question of law but of fact. Petitioners' *factual* contention is that their damages were caused by—their claims for damages are based upon—negligent, non-discretionary laboratory testing. To be sure, the Government contends that Petitioners' damages were caused by a discretionary decision by the FDA Commissioner. But that is not a "*legal* contention;" it is a factual contention, and one with no support in the record.

The Government states that the FDA Commissioner's decision to embargo the fruit and order its destruction was taken "in light of [the Philadelphia laboratory] testing (and the other information before him)," and that it was this "discretionary action ... that caused the harm." Opposition Brief at 9. What "other information?" If indeed there is any "information" that would entitle a trier of fact to find that the Commissioner's decision was taken "in light of" (to use the Government's words), or was "based upon" (to use the statute's words), information "other" than the information alleged by Petitioners, then let the Government file an answer to the complaints and proceed to discovery under the Federal Rules of Civil Procedure so that the "other information" alluded to by the Government in its brief may become apparent of record. To dismiss the complaints now, without requiring the Government to produce the "other information" it says it has, would be a grave injustice.[3]

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3. Petitioners have by their complaints represented to this Court that they are prepared to produce evidence on the basis of which a trier of fact could find that their damages were caused by the negligent, non-discretionary conduct of Government employees—precisely the sort of conduct that the Congress has provided should be the basis of compensation. The Government's reference to the observation by the in banc dissenting

4. Assuming the Government is correct that the "based upon" language of Section 2680(a) creates an additional pleading requirement, it has failed to suggest what the substantive content of this requirement is or should be. Whether a claim is "based upon" discretionary or non-discretionary conduct would seem to present an issue of causation: Did discretionary or non-discretionary conduct cause the harm upon which the claim is based? If the "based upon" standard is a causation standard (and the Government does not suggest anything else that it could be), why is an additional causation standard required beyond the cause-in-fact and proximate cause standards required properly to plead a tort under state tort law? The Tort Claims Act expressly states that state tort law will supply the cause of action available to plaintiffs permitted to sue under its waiver of sovereign immunity. 28 U.S.C. § 1346(b). If the "based upon" standard is something beyond the cause-in-fact and proximate cause standards, what is the substantive content of this standard? None of these significant issues is addressed in the Government's brief.

5. The Government has made scant effort to argue that these cases do not satisfy all of the criteria supporting review by this Court. The issue presented in these cases caused a 7-6 split among the in banc Third Circuit, which the Government cannot dispute. The Government does not deny, or even mention, that these cases involve some 2,400 Chilean claimants, that the conduct at issue demolished the Chilean agricultural sector for an entire growing season, and that significant international trade considerations are implicated in these cases. *See* Brief as *Amici Curiae* of the Delaware River Port Authority and the Port of Philadelphia and Camden, Inc. Similarly, the

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NOTES *(Continued)*

judges that Petitioners "may encounter difficulty" in proving their claim, Opposition Brief at 5, is unworthy. It is not the part of the Government, however obliquely, to suggest that Petitioners' case is so weak it may as well be dismissed now. As the dissenting judges recognized, Petitioners, having stated a valid claim, are entitled to have it heard; whether evidence in support of a valid claim is weak or strong is for the trier of fact, not the Government, to say.

Government seeks to minimize or ignore the importance of these cases to the entire regime of litigation against the Government under the Tort Claims Act by suggesting that their interpretation of Section 2680(a) is supported by existing case-law, when, in fact, the Government's position (and that of the in banc Third Circuit majority) is a marked departure from existing law.

Finally, the Government attempts to argue that the issue presented by the Petition has not generated a split among the Courts of Appeals. Specifically, it argues that *Patterson v. United States,* 881 F.2d 127 (4th Cir. 1989), and *Appley Bros. v. United States,* 7 F.3d 720 (8th Cir. 1993), are consistent not only with each other, but also with the decision of the in banc Third Circuit in these cases. The Government's argument does not bear analysis. That a split exists is demonstrated by the fact that the in banc Third Circuit majority cited *Patterson* as supporting its result, Pet. App. at 16a, while the in banc dissent cited *Appley Brothers,* Pet. App. at 22a n. 1, as supporting its analysis. In *Patterson,* the Fourth Circuit held that the complaint was subject to dismissal because the harm alleged was caused by a discretionary decision that followed a non-discretionary inspection. In *Appley Brothers,* the Eighth Circuit held that the complaint was not subject to dismissal because the harm alleged was caused by the non-discretionary inspection of a grain warehouse, notwithstanding the subsequent discretionary decision to allow the warehouse to remain open. To say, as the Government does, Opposition Brief at 12, that the harm in *Appley Brothers* was not "based upon" a discretionary decision not only contradicts the very position the Government argued in that case, 7 F.3d at 726, it also misses the point that a split exists in the circuits. The Fourth and Eighth Circuits reached opposite conclusions regarding what conduct the complaints were "based upon" in the respective cases before them.[4] In addition to the other factors described above, this Court should grant the petition for certiorari to resolve the split among the courts of appeals.

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4. In fact, the Government sought reconsideration of the panel decision in *Appley Brothers* and argued that the panel decision was "contrary to Supreme Court precedent and decisions of other courts of appeals." *See* Appellee's Petition for Rehearing at 2.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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